

ENROLLED ACT NO. 35, HOUSE OF REPRESENTATIVES

SIXTIETH LEGISLATURE OF THE STATE OF WYOMING  
2010 BUDGET SESSION

AN ACT relating to underground public utilities; providing for civil penalties for damages to underground public utilities; providing notification requirements before excavations; providing definitions; providing for mitigation of damages; providing for safety training programs; and providing for an effective date.

*Be It Enacted by the Legislature of the State of Wyoming:*

**Section 1.** W.S. 37-12-306 is created to read:

**37-12-306. Civil penalties; applicability.**

(a) An action to recover a civil penalty under this section may be brought by an operator, excavator, aggrieved party, the notification center, county attorney, district attorney or the attorney general. Venue for an action shall be in the district court for the county in which the operator, excavator, aggrieved party or the notification center 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. The action provided in this subsection may be by jury trial if a jury is demanded by either party.

(b) In determining the liability for or the amount of any damages or civil penalty pursuant to this section, a court shall consider the nature, circumstances and gravity of the alleged violation, the alleged violator's degree of culpability and the alleged violator's history of prior violations.

(c) The penalties provided in this section are in addition to any other remedy available at law or equity.

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(d) No civil penalty shall be imposed under this section against an excavator or operator who violates any of the provisions of this article if the violation occurred while the excavator 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.

(e) This section shall not apply to any governmental entity as defined by W.S. 1-39-103(a)(i), which participates in the notification center as provided by this act. Nothing in this article shall affect any provision of the Wyoming Governmental Claims Act, W.S. 1-39-101 through 1-39-120.

(f) Any civil penalty received under subsection (g) or (h) of this section shall be deposited into the county public school fund of the county in which the violation occurred.

(g) With respect to operators:

(i) Every operator in Wyoming shall join and participate in the notification center pursuant to W.S. 37-12-304(a). Any operator who does not join or participate in the notification center shall be liable for a fine of five hundred dollars (\$500.00) each year it is not in compliance with this subsection;

(ii) If any underground facility located in the service area of an operator is damaged as a result of the operator's failure to join or participate in the notification center pursuant to W.S. 37-12-304(a), the court shall impose upon such operator a civil penalty up to the amount of five thousand dollars (\$5,000.00) for the first offense and up to twenty-five thousand dollars (\$25,000.00) for a second offense within a twelve (12)

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month period after the first offense. If any underground facility located in the service area of an operator is damaged as a result of the operator's failure to join or participate in the notification center pursuant to W.S. 37-12-304(a) on more than two (2) separate occasions within a twelve (12) month period from the date of the first failure to comply with W.S. 37-12-304(a), then the civil penalty shall be up to seventy-five thousand dollars (\$75,000.00). Upon a first offense, the operator may be required by the court to complete an excavation safety training program with the notification center;

(iii) If any underground facility is damaged as a result of the operator's failure to comply with W.S. 37-12-304(a) or failure to use reasonable care in the marking of the damaged underground facility, the operator shall be liable for:

(A) 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

(B) Any injury or damage to persons or property resulting from the damage to the underground facility. The 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.

(iv) If an operator, after receipt of a notice from an excavator or notification center pursuant to W.S. 37-12-302(c), fails to mark the location of its underground facilities within the time period specified in W.S.

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37-12-302(d), and unless the failure resulted from circumstances beyond the operator's control, the court shall impose upon the operator a civil penalty of up to five hundred dollars (\$500.00) for each violation. For purposes of this paragraph, each day of delay in marking underground facilities shall be a separate violation.

(h) With respect to excavators:

(i) Every excavator shall notify the notification center pursuant to W.S. 37-12-302(c) prior to commencing any excavation activity. Any excavator who fails to notify the notification center pursuant to W.S. 37-12-302(c) shall be liable for a civil penalty in the amount of five hundred dollars (\$500.00);

(ii) If an excavator fails to comply with W.S. 37-12-302(c) and damages an underground facility during excavation, the excavator shall be liable for a civil penalty up to the amount of five thousand dollars (\$5,000.00) for the first offense and up to twenty-five thousand dollars (\$25,000.00) for a second offense within a twelve (12) month period after the date of the first offense. If an excavator fails to comply with W.S. 37-12-302(c) on more than two (2) separate occasions within a twelve (12) month period from the date of the first failure to comply with W.S. 37-12-302(c), then the civil penalty shall be up to seventy-five thousand dollars (\$75,000.00). Upon a first offense, the excavator may be required to complete an excavation safety training program with the notification center;

(iii) If an excavator requests a facilities locate on an expedited basis (less than two (2) full business days) for an emergency excavation and the excavation at issue was not an emergency and did not

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require a locate on an expedited basis, the excavator shall be liable for a civil penalty of up to five hundred dollars (\$500.00) for each false emergency locate incident;

(iv) If an excavator fails to comply with W.S. 37-12-302(c) and damages an underground facility during an excavation, or fails to exercise reasonable care in excavating and damages a located underground facility during an excavation, the excavator shall be liable for:

(A) Any cost or damage incurred by the operator in restoring, repairing or replacing its damaged underground facility, together with reasonable costs and expenses of suit, including reasonable attorney fees; and

(B) Any injury or damage to persons or property resulting from the damage to the underground facility. The excavator shall also indemnify and defend the 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.

(v) Subparagraph (iv)(A) of this subsection shall not apply to an excavator if the operator of the underground facility has failed to comply with W.S. 37-12-302(d) or 37-12-304(a).

**Section 2.** W.S. 37-12-301(b)(ii), (iii), by creating a new paragraph (iv), by renumbering (iv) and (v) as (v) and (vi), by creating a new paragraph (vii), by renumbering (vi) through (ix) as (viii) through (xi) and by amending and renumbering (x) as (xii), 37-12-302(a), (b), (c)(intro), (i), (iii), (d), (f), (g) and (h), 37-12-304(a), (b)(iii) by creating a new subparagraph (C),

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(vii) and by creating a new paragraph (ix) and 37-12-305(e) are amended to read:

**37-12-301. Short title; definitions.**

(b) As used in this act:

(ii) "Emergency" means ~~an~~a sudden, unforeseen occurrence, including a loss of communications, which demands immediate action to protect the health, safety and welfare of the public and to prevent loss of life, health, property or essential public services and advance notice to the notification center prior to excavation is impracticable under the circumstances. "Emergency" shall include ruptures and leakage of pipelines, explosions, fires and similar instances where immediate action is necessary to prevent loss of life or significant damage to underground facilities or the environment;

(iii) "Excavation" or "excavates" means any operation in which earth, rock or other ~~material~~materials on or below the ground is moved or otherwise displaced by means of hand or power tools, power equipment or explosives or other means, and includes grading, trenching, digging, ditching, drilling, augering, tunneling, boring, plowing-in, pulling-in, ripping, scraping and cable or pipe installing, except tilling of soil and gardening or agricultural purposes;

(iv) "Excavator" means any person or entity that excavates or conducts excavation activities;

~~(iv)~~(v) "Impoundment" means a closed basin formed naturally, or artificially built, which is dammed or excavated for the retention of water, slurry or other liquid or semi-liquid material;

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~~(v)~~(vi) "Notification center" means a center that receives notice from excavators of planned excavation or other requests for location and transmits this notice to participating operators;

(vii) "Operator" means any person, including public utilities, municipal corporations, political subdivisions or other persons having the legal authority to bury, operate, maintain, repair and replace underground facilities;

~~(vi)~~(viii) "Person" means an individual, partnership, municipality, state, county, political subdivision, utility, joint venture, corporation, limited liability company, statutory trust or other business entity and includes the employer of an individual;

~~(vii)~~(ix) "Secured facility" means a parcel of land used for commercial or industrial purposes that is surrounded entirely by a fence or other means of preventing access, including a fence with one (1) or more gates that are locked at all times or monitored by a person who can prevent unauthorized access;

~~(viii)~~(x) "Sump" means a surface pit into which drilling mud flows on reaching the surface of the well after being pumped through the drill pipe and bit, then up through the annular opening between the walls of the hole and the drill pipe, carrying with it cuttings from the well, which settle out of the mud in the sump pits;

~~(ix)~~(xi) "Underground facility" means any item of personal property buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or ~~telegraphic~~other form of

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electronic communications, cable television, electric energy, oil, gas, hazardous liquids or other substances and including but not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes and attachments;

~~(x)(xii)~~ "This act" means W.S. 37-12-301 through ~~37-12-305~~ 37-12-306.

**37-12-302. Notice of excavation by excavator; information to be supplied upon notice; exceptions; penalty.**

(a) Every ~~person having the right to bury underground facilities~~ operator shall file with the notification center a general description of the area served together with the name, address and telephone number of the person from whom necessary information may be obtained concerning the location of underground facilities.

(b) Any person requiring ~~excavation or design for or designing architectural or engineering drawings that call for~~ excavation shall obtain information from ~~persons with underground facilities~~ operators, as to the nature, location, and depth if known, of underground facilities. If the information is not available, the person requiring or designing architectural or engineering drawings that call for excavation shall determine at their expense the nature and location of the underground facilities. The person requiring or designing architectural or engineering drawings that call for excavation shall make the information and location a part of the plan by which the excavators operate. ~~This subsection shall not apply to underground facility owners performing excavation on their own underground facilities.~~



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(c) Except as hereafter provided, no ~~person~~excavator shall make or begin excavation without first notifying ~~any person having underground facilities in the area~~the notification center of the proposed excavation. Notice shall be given by ~~any telephone, e-mail, fax or other electronic medium or in person~~approved by the notification center at least two (2) full business days, but not more than fourteen (14) business days prior to any excavation to the notification center pursuant to W.S. 37-12-304. Unless the location marks are still visible, if an excavation on a single project lasts more than fourteen (14) business days, the excavator shall give notice at least once each succeeding fourteen (14) business day period. Notice to the notification center is notice to each member thereof in the area. Notification of the following information to the notification center shall be required and shall include the following:

(i) Name of the person notifying the ~~system~~notification center;

(iii) Specific location by legal description or other reliable method that allows for current and accurate means of identifying geographic locations, and starting date and description of the intended activity.

(d) ~~A person~~An operator shall at ~~their~~its expense, upon receipt of the notice provided for in subsection (c) of this section, use reasonable care to mark the location of the underground facilities with stakes, flags, paint or by other clearly identifiable marking within twenty-four (24) inches horizontally from the exterior sides of the operator's underground facilities. The location shall be marked using American Public Works Association uniform color standards. If requested by the excavator, the ~~person~~operator receiving the notice shall advise the excavator of

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the nature, location, size, function and depth if known, of underground facilities in the proposed excavation area. The ~~person providing information~~ operator shall respond no later than two (2) full business days after receipt of the notice from the notification center or at a time otherwise mutually agreed to by the parties operator and excavator.

(f) If information ~~requested~~ required pursuant to ~~subsections (c) and subsection~~ subsection (d) of this section is not provided within the time specified therein, or if the information provided fails to identify the location of the underground facilities in accordance with subsection (d) of this section, then any ~~person~~ excavator damaging or injuring underground facilities shall not be liable for such damage or injury except ~~on proof of negligence when failing to utilize reasonable care~~. However, if information ~~requested~~ required pursuant to ~~subsections (c) and subsection~~ subsection (d) of this section is provided within the time specified therein, and if the information provided sufficiently identifies the location of the underground facilities in accordance with subsection (d) of this section, then any ~~person~~ excavator damaging or injuring underground facilities shall be liable for all damage or injury to persons or property.

(g) Compliance with this section does not excuse ~~a person from acting in a careful and prudent manner~~ an excavator from exercising reasonable care in complying with this act nor does compliance with this section excuse ~~a person~~ an excavator from liability for damage or injury for failure to so act. When excavating, reasonable care shall require hand digging, as necessary, to protect the underground facility.

(h) When any contact with or damage to any underground facility occurs, the excavator shall

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immediately ~~inform~~notify the operator of the facility and the notification center, of the location of and extent of damage to the underground facility and shall cooperate with the operator of the damaged underground facility to mitigate the damages incurred to the extent reasonably possible, including the provision of in-kind work where technical or special skills are not required according to the nature of the underground facility. An excavator shall not conceal or attempt to conceal any dislocation, disturbance or damage to an underground facility and shall not repair or attempt to repair the underground facility unless authorized by the operator of the underground facility. Upon notification of damage to an underground facility from an excavator, the operator of the underground facility shall respond to the notification in a manner reasonably appropriate to the circumstances. The operator shall file a report with the notification center describing the response within seventy-two (72) hours of the initial notification. This requirement of notification shall not relieve the excavator and the operator from compliance with any other state or federal notification obligation. In any dispute concerning the liability for damages to any underground facility, the excavator shall bear the burden of proof concerning its use of reasonable care in conducting the excavation.

**37-12-304. Notification centers; formation; duties.**

(a) ~~Persons having underground facilities~~ All operators shall join the notification center and shall participate in the notification center providing for mutual receipt of notification of excavation activities in a specified area and pay their share of the cost for the service provided.

(b) The notification center shall:

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(iii) Maintain adequate records documenting compliance with the requirements of this act, including the following:

(C) Written records related to all complaints and responses alleging noncompliance with this act.

(vii) Upon request, provide to ~~persons~~ excavators 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 transmitted;

(ix) Offer an excavation safety training program.

**37-12-305. Exemptions.**

(e) Private domestic water and sewer lines located outside any incorporated area and serving ~~five (5)~~ nine (9) or fewer service hook-ups, private irrigation and drainage lines and ditches, irrigation district and drainage district lines and ditches, and private livestock water pipelines and facilities are exempt from the provisions of this act.

**Section 3.** W.S. 37-12-302(j) and (k) is repealed.

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**Section 4.** This act is effective July 1, 2010.

(END)

\_\_\_\_\_  
Speaker of the House

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Governor

TIME APPROVED: \_\_\_\_\_

DATE APPROVED: \_\_\_\_\_

I hereby certify that this act originated in the House.

\_\_\_\_\_  
Chief Clerk