

# DAMAGE PREVENTION BOARD STATUTES

## TITLE 55. PROPERTY IN GENERAL CHAPTER 22. UNDERGROUND FACILITIES DAMAGE PREVENTION

### § 55-2201. Legislative Intent.

It is the intent of the legislature in enacting this chapter to create a system of stakeholder-driven education and enforcement addressing the prevention of damage to underground facilities, to assign responsibilities for locating and keeping accurate records of underground facility locations, for preventing and repairing damage to existing underground facilities, for collecting, storing, analyzing and disseminating data related to underground facility damage and excavator downtime events, and for protecting the public health and safety from great personal harm including death, property damage and interruption in vital services caused by damage to existing underground facilities. It is further the intent of the legislature that the state of Idaho, by adopting this chapter, reaffirms its primacy over underground facility damage prevention programs that protect the health, safety and property of its citizens and that, by adopting this chapter, Idaho precludes the pipeline and hazardous materials safety administration of the United States department of transportation from determining that Idaho's damage prevention enforcement is inadequate pursuant to 49 CFR part 198, as adopted on July 9, 2015, and effective on January 1, 2016, and prevents any subsequent federal administrative enforcement actions that would result from such a formal determination.

### § 55-2202. Definitions. As used in this chapter:

- (1) "Administrator" means the administrator of the division of building safety.
- (2) "Board" means the damage prevention board.
- (3) "Business day" means any day other than Saturday, Sunday, or a legal, local, state, or federal holiday.
- (4) "Damage" means any impact or exposure that results in the substantial weakening of structural or lateral support of an underground facility, or the penetration, impairment, or destruction of any underground protective coating, housing, or other protective device, or the partial or complete destruction of the facility, or the severance, partial or complete, of any underground facility to the extent that the project owner of the affected underground facility owner determines that repairs are required.
- (5) "Emergency" means any sudden or unforeseen condition constituting a clear and present danger to life, health or property, or a customer service outage, or the blockage of roads or transportation facilities that requires immediate action.
- (6) "Excavation" means any operation in which earth, rock, or other material in the ground is moved or otherwise displaced by any means including, but not limited to, explosives.
- (7) "Excavator" means any person who engages directly in excavation.
- (8) "Excavator downtime" means lost time for an excavation project due to failure of one (1) or more stakeholders to comply with applicable damage prevention regulations.

(9) “Identified but unlocatable underground facility” means an underground facility which has been identified but cannot be located with reasonable accuracy.

(10) “Identified facility” means any underground facility which is indicated in the project plans as being located within the area of proposed excavation.

(11) “Locatable underground facility” means an underground facility which can be field-marked with reasonable accuracy.

(12) “Marking means the use of stakes, paint, or other clearly identifiable materials to show the field location of underground facilities, in accordance with the current color code standard of the American public works association. Markings shall include identification letters indicating the specific type of the underground facility.

(13) “One-number notification service” means a service through which a person can notify owners of underground facilities and request field-marking of their underground facilities.

(14) “Person” means an individual, partnership, association, corporation, a state, a city, a county, or any subdivision or instrumentality of a state, and its employees, agents, or legal representatives.

(15) “Reasonable accuracy” or “reasonably accurate” means location within twenty-four (24) inches horizontally of the outside dimensions of each side of an underground facility.

(16) “Rural underground facility owner” means an underground facility owner that is a public utility or a member-owned cooperative that serves fewer than five thousand (5,000) total customers in a county or counties with populations that do not exceed fifty thousand (50,000) people.

(17) “Stakeholder” means any party with an interest in protecting underground facilities, including, but not limited to, persons, property owners, underground facility owners, excavators, contractors, cities, counties, highway districts, railroads, public entities that deliver irrigation water and those engaged in agriculture.

(18) “Underground facility” means any item buried or placed below ground for use in connection with the storage or conveyance of water (unless being delivered primarily for irrigation), sewage, electronic, telephonic or telegraphic communications, cable television, electric energy, petroleum products, gas, gaseous vapors, hazardous liquids, or other substances and including, but not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, and those parts of poles or anchors below ground.

(19) “Underground facility owner” means any person who owns or operates an underground facility.

### **§ 55-2203. Damage Prevention Board.**

(1) The Idaho damage prevention board is hereby created and made a part of the division of building safety. The principal purpose of the board is to reduce damages to underground facilities and to promote safe excavation practices through education directed toward excavators, underground facility owners and the public at large. The board also shall review complaints of alleged violations of this chapter. It shall be the responsibility and duty of the administrator to administer

this chapter, and the administrator shall exercise such powers and duties as are reasonably necessary to enforce the provisions of this chapter.

(2) The board shall consist of eleven (11) members, each of whom shall be appointed by and serve at the pleasure of the governor. All members of the board shall be qualified by experience, knowledge and integrity in formulating rules, reviewing complaints referred to it and assessing penalties, and properly performing the functions of the board. Of the eleven (11) members, one (1) each shall represent the interests of the following designated groups and be:

- (a) A city official or a county official;
- (b) An employee or elected official of a highway district;
- (c) An employee of the Idaho public utilities commission;
- (d) An employee or officer of a one-number notification service entity or a member of the Idaho utility coordinating council or similar cooperative statewide nonprofit organization created to coordinate the protection of underground facilities in specific geographic portions of the state;
- (e) An employee or officer of an underground facility owner;
- (f) An employee or officer of an underground pipeline facility owner;
- (g) An employee or officer of a rural underground facility owner;
- (h) An employee or officer of a contractor;
- (i) An employee or officer of a building contractor;
- (j) An employee or officer of an excavator; and
- (k) An employee or owner of an agricultural enterprise, a representative of the agriculture industry, or an employee or an official of a public entity that delivers water for irrigation.

(3) Each member of the board shall serve a term of four (4) years, and such terms shall be staggered. The initial board shall have three (3) members whose terms expire July 1, 2018; four (4) members whose terms expire July 1, 2019; and four (4) members whose terms expire July 1, 2020. Thereafter, each board member shall be appointed for a term of four (4) years. No member of the board may be appointed to more than two (2) consecutive terms. A member may continue to serve until a successor is appointed. A successor must represent the same designated group that his predecessor was appointed to represent.

(4) The board shall meet within thirty (30) days after the appointment of all its members and thereafter at such other times as may be expedient and necessary for the proper performance of its duties, but the board shall hold at least two (2) regular meetings per year. At the board's first meeting, the members shall elect one (1) of their number to be chairman and one (1) to serve as the vice chairman. The chairman may serve in such capacity for a one (1) year term and may not serve in such capacity for more than two (2) consecutive terms. A majority of the board shall constitute a quorum for the transaction of business. The administrator shall serve as the secretary to the damage prevention board.

(5) Each member of the board shall be compensated as provided by *section 59-509(n), Idaho Code*.

(6) Each member of the board who is a contractor shall be registered in accordance with *chapter 52, title 54, Idaho Code*, and shall be in good standing.

(7) The activities of the board shall be funded by a fee established by the board and promulgated in rule. Such fee shall be adopted by the board by no less than eight (8) affirmative votes at a meeting duly called for such purpose at which a quorum is present and shall be imposed uniformly upon all of the underground facility owners required by the provisions of this chapter to participate in and cooperate with the one-number notification service. The fee shall be assessed upon an underground facility owner each time such owner receives notice from a one-number notification service as required by *section 55-2205, Idaho Code*. The fee is established to defray the expense of the board and the division in supervising, regulating and administering the provisions of this chapter, and the provision of services hereunder. The fee assessed upon an underground facility owner shall be collected by a one-number notification service and payable to the board in accordance with a schedule and in a manner established by the board in rule. All fees collected by the board shall be deposited with the state treasurer to be credited to the damage prevention board fund established pursuant to *section 55-2204, Idaho Code*.

(8) The board shall cause educational materials regarding safe digging practices and the dangers of failing to provide notice prior to excavating to be prepared and distributed statewide on an ongoing basis. The board may enter into agreements with other entities for this purpose.

(9) The board, by rule, may adopt or create training programs on all pertinent underground damage prevention topics, which may include, but are not limited to, safe excavation, locating and marking of facilities, determining facility damage, emergency procedures, excavator downtime, pre-marking of intended excavation areas, and procedures used when encountering unmarked facilities, for general use or for remedial training that may be ordered by the board pursuant to *section 55-2211, Idaho Code*.

(10) The board shall periodically review the effectiveness of the methods used for maintaining effective communications among stakeholders from receipt of an excavation notification until successful completion of the excavation and may adopt, by rule, methods to maintain or improve these communications among stakeholders.

(11) The board shall review complaints alleging violations of this chapter by any party against any other party subject to the jurisdiction of the board involving practices related to public safety and underground facilities damage prevention including, but not limited to, notification procedures, pre-marking of areas to be excavated, marking of facilities, excavation practices, excavator downtime, inaccurate location of facilities, untimely location of facilities, untimely commencement of excavation, failure of a permitting entity to reinstate a permit in a timely manner, failure of an underground facility owner to participate in a one-number notification service as required, or failure by a party to report damage data when required, and may impose appropriate training requirements or enforcement discipline as authorized by this chapter. The proceedings shall be governed by the provisions of *section 55-2211 and chapter 52, title 67, Idaho Code*. Any party aggrieved by the action of the board shall be entitled to judicial review thereof in accordance with the provisions of *chapter 52, title 67, Idaho Code*.

(12) To continually evaluate and improve program effectiveness, the board shall analyze the data collected pursuant to *section 55-2208, Idaho Code*, including the number of reported damage and downtime events and trends, the causes of such damage and any recommendations to further

reduce the number of damage or downtime events annually. The board shall make its analysis publicly available.

(13) The board shall adopt, by rule, a process for reviewing the adequacy of underground facility owners' use of internal performance measures for those locating underground facilities and recommending changes to improve such performance.

(14) The board shall adopt, by rule, a process for reviewing and promoting the use, by all appropriate stakeholders, of improving technologies that may enhance communications, underground facility locating capability and the gathering and analysis of appropriate data.

(15) The board is authorized and directed to promulgate rules consistent with this act for the administration of this chapter and to effectuate the purpose thereof, except as may be limited or prohibited by law and the provisions of this chapter.

(16) The board may exercise such powers and duties as are reasonably necessary to carry out the provisions of this chapter. The board is authorized to, and may among other activities:

(a) Hold meetings and attend or be represented at such meetings, prepare and publish rules pertaining to this section, make investigation or inquiry, conduct hearings, report findings and enter orders in matters over which the board has authority;

(b) Summon witnesses to appear and testify before it on any matter within the provisions of this chapter. No person shall be required to testify outside the county wherein he resides or where his principal place of business is located. A summons to testify shall be issued and served in like manner as a subpoena of a witness issued from the district court or in any other manner consistent with the procedures of the division of building safety;

(c) Administer oaths and take affirmations of witnesses appearing before the board and appoint competent persons to issue subpoenas, administer oaths and take testimony, and appoint hearing officers;

(d) Impose civil penalties and conduct hearings related thereto for violations of this chapter or the rules of the board;

(e) Enter into agreements with any vendor or contractor to provide services or administer any obligation imposed on the board or the administrator by law, as well as the authority to make expenditures, and to make purchases in accordance with *chapter 57, title 67, Idaho Code*, to effectuate such agreements; and

(f) Delegate to the administrator the power to perform ministerial functions, conduct investigations, recommend and collect civil penalties on its behalf and appoint hearing officers.

(17) The board may establish by administrative rule the fines to be paid for penalties issued for violations of this chapter. In no case shall the penalty exceed the limits prescribed in *section 55-2211, Idaho Code*.

(18) The board may receive contributions, gifts and grants on behalf of and in aid of the program. Such contributions, gifts and grants shall be deposited in the damage prevention board fund established pursuant to *section 55-2204, Idaho Code*.

**§ 55-2204. Damage Prevention Board Fund Established – Use of Funds.**

(1) All moneys received by the administrator under the terms and provisions of this chapter shall be paid into the state treasury as directed by the provisions of *section 59-1014, Idaho Code*, and shall be held by the state treasurer in a dedicated fund to be known as the damage prevention board fund and, other than as prescribed in subsection (2) of this section, all such moneys placed in said fund shall be set aside and appropriated to the division of building safety to carry into effect the provisions of this chapter.

(2) All moneys received from civil penalties collected under the provisions of this chapter shall be deposited into the damage prevention board fund and shall be spent exclusively in support of board activities to develop and disseminate educational programming designed to improve worker and public safety relating to excavation and underground facilities.

**§ 55-2205. Permit Compliance – Notice of Excavation – Response to Notice – Compensation for Failure to Comply – Exemptions.**

(1) Before commencing excavation, the excavator shall:

(a) Comply with other applicable law or permit requirements of any public agency issuing permits;

(b) Pre-mark on-site the path of excavation with white paint or, as the circumstances require, other reasonable means that will set out clearly the path of excavation. An excavator need not pre-mark as required in this subsection if:

(i) The underground facility owner or its agent can determine the location of the proposed excavation by street address or lot and block by referring to a locate ticket; or

(ii) The excavator and underground facility owner have had a meeting prior to the beginning of the proposed excavation at the excavation site for the exchange of information required under this subsection.

(c) Provide notice of the scheduled commencement of excavation to all underground facility owners through a one-number notification service. If no one-number notification service is available, notice shall be provided individually to those owners of underground facilities known to have or suspected of having underground facilities within the area of proposed excavation. The notice shall be communicated by the excavator to the one-number notification service or, if no one-number notification is available, to the owners of underground facilities not less than two (2) business days nor more than ten (10) business days before the scheduled date for commencement of excavation, unless otherwise agreed in writing by the parties.

(2) Upon receipt of the notice provided for in this section, the underground facility owner or the owner's agent shall locate and mark its locatable underground facilities by surface-marking the location of the facilities. If there are identified but unlocatable underground facilities, the owner of such facilities or the owner's agent shall locate and mark the underground facilities in accordance with the best information available to the owner of the underground facilities and with reasonable accuracy as defined in *section 55-2201(15), Idaho Code*. The owner of the underground facility or the owner's agent providing the information shall respond no later than two (2) business days after

the receipt of the notice or before the excavation time set forth in the excavator's notice, at the option of the underground facility owner, unless otherwise agreed in writing by the parties. Excavators shall not excavate until all known facilities have been marked. Once marked by the owner of the underground facility, or the owner's agent, the excavator is responsible for maintaining the markings. Unless otherwise agreed in writing by the parties, maintained markings shall be valid for purposes of the notified excavation for a period of no longer than three (3) consecutive weeks following the date of notification so long as it is reasonably apparent that site conditions have not changed so substantially as to invalidate the markings. If excavation has not commenced within three (3) weeks from the original notice to underground facility owners through the one-number notification service, the excavator shall reinitiate notice in accordance with this section.

(a) Excavators shall have the right to receive compensation from the owner of the underground facility for costs incurred if the owner of the underground facility does not locate its facilities in accordance with this chapter.

(b) The owner of the underground facility shall have the right to receive compensation for costs incurred in responding to excavation notices given less than two (2) business days prior to the excavation except for notices given for discovered facilities after the owner has identified facilities.

(3) Emergency excavations are exempt from the time requirements for notification provided in this section.

(4) If the excavator, while performing the excavation, discovers underground facilities (whether active or abandoned) which are not identified or were not located with reasonable accuracy, the excavator shall cease excavating in the vicinity of the facility and immediately notify the owner or operator of such facilities, or the one-number notification service. The excavator shall have the right to receive compensation from the underground facility owner for standby cost (based on standby rates made publicly available) incurred as a result of waiting for the underground facility owner or the owner's agent to arrive at the work site to identify the unidentified facilities and provided that if the underground facility owner or the owner's agent supplies reasonably accurate locate information within eight (8) hours of the time that the excavator notifies the underground facility owner of facilities not previously located, the excavator's compensation for delay of the excavation project shall be limited to actual costs or two thousand dollar (\$2,000), whichever is less.

**§ 55-2206. One-Number Notification Service – Establishment – Participation Required – Funding.**

Two (2) or more persons who own or operate underground facilities in a county may voluntarily establish or contract with a third person to provide a one-number notification service to maintain information concerning underground facilities within a county. Upon the establishment of the first such one-number notification service, all others operating and maintaining underground facilities within said county shall participate and cooperate with the service, and no duplicative service shall be established pursuant to this chapter. The activities of the one-number locator service shall be funded by all of the underground facility owner/operators required by the provisions of this section to participate in and cooperate with the service. All underground facility owner/operators who are required to participate in a one-number notification service are subject to the jurisdiction of the damage prevention board established in *section 55-2203, Idaho Code*.

**§ 55-2207. Excavation Contracts – Limitations – Precautions to Avoid Damage – Liability for Damage.**

(1) Project owners shall indicate in bid or contract documents the existence of underground facilities known by the project owner to be located within the proposed area of excavation.

(2) An excavator shall use reasonable care to avoid damaging underground facilities. An excavator shall:

(a) Determine by hand digging, in the area twenty-four (24) inches or less from the facilities, the precise actual location of underground facilities which have been marked;

(b) Plan the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area; and

(c) Provide such support for underground facilities in and near the construction area, including during backfill operations, as may be reasonably necessary for the protection of such facilities.

(3) If an underground facility is damaged and such damage is the consequence of the failure to fulfill an obligation under this chapter, the party failing to perform that obligation shall be liable for any damages to the underground facility owner. Nothing in this chapter prevents the parties to an excavation contract from contracting with respect to the allocation of risk for changed or differing site conditions.

(4) In any action brought under this section, the prevailing party is entitled to reasonable attorney's fees.

**§ 55-2208. Damage to Underground Facilities – Duties of Excavator and Owner – Reporting of Data.**

(1) An excavator who, in the course of excavation, contacts or damages an underground facility shall notify the underground facility owner and the one-number notification service. If the damage causes an emergency condition or an actual breach of an underground facility that releases gas or hazardous liquids into the surrounding environment, the excavator causing the damage shall also alert the appropriate local public safety agencies by, at a minimum, calling 911, and take all appropriate steps to ensure the public safety. No damaged underground facility may be buried until it is repaired or relocated.

(2) The owner of the underground facilities damaged shall arrange for repairs or relocation as soon as is practical or may permit the excavator to do necessary repairs or relocation at a mutually acceptable price.

(3) Any party responsible for damages to an underground facility shall be liable for the cost of repairs.

(4) The board shall adopt by rule a procedure for the processing of claims related to damages to underground facilities.

(5) Underground facility owners and excavators who observe, suffer or cause damage to an underground facility or observe, suffer or cause excavator downtime related to a failure of one (1) or more stakeholders to comply with applicable damage prevention regulations shall report such information to the board in accordance with the rules promulgated by the board. Reporting of such data does not constitute a complaint provided for in *section 55-2211, Idaho Code*.

**§ 55-2209. Duties of Public Agency Issuing Excavation, Building or Other Similar Permits.**

(1) Any public agency, as defined in *section 67-2327, Idaho Code*, that has the authority to issue excavation, building or other similar permits shall notify persons seeking such permits of the existence of this chapter and the one-number notification service telephone number.

(2) A permit shall not be valid for excavation until or unless the notice provisions of this section have been complied with, and the portion of the permit directly relating to excavation may be suspended by the issuing public agency if the permit holder violates any provisions of this chapter. The issuing public agency shall reinstate the permit at no charge within forty-eight (48) hours of receiving evidence of compliance with the provisions of this chapter.

**§ 55-2210. Excavations Exempt from Notice Requirement.**

Unless facts exist which would reasonably cause an excavator to believe that an underground facility exists within the depth of the intended excavation, the following excavations shall not require notice of the excavation pursuant to *section 55-2205(1) (c), Idaho Code*:

(1) An excavation of less than fifteen (15) inches in vertical depth outside the boundaries of an underground facility easement of public record or private property.

(2) The tilling of soil to a depth of less than fifteen (15) inches for agricultural practices.

(3) The extraction of minerals within recorded mining claims or excavation within material sites legally located and of record, unless such excavation occurs within the boundaries of an underground facility easement.

(4) Normal maintenance of roads, streets and highways, including cleaning of roadside drainage ditches and clear zones, to a depth of fifteen (15) inches below the grade established during the design of the last construction of which underground facility owners were notified and which excavation will not reduce the authorized depth of cover of an underground facility.

(5) Replacement of highway guardrail posts, sign posts, delineator posts, culverts, and traffic control device supports in the same approximate location and depth of the replaced item within public highway rights-of-way.

(6) Normal maintenance of railroad rights-of-way, except where such rights-of-way intersect or cross public roads, streets, highways, or rights-of-way adjacent thereto, or recorded underground facility easements.

**§ 55-2211. Violation – Civil Penalty – Duties of the Board and the Administrator – Other Remedies Unimpaired.**

(1) The damage prevention board established in *section 55-2203, Idaho Code*, may hear, but may not initiate, contested cases of alleged violations of this chapter involving practices related to underground facilities as set forth in rules by the board. Persons who violate the provisions of this chapter are subject to civil penalties in accordance with this section. Complaints regarding an alleged violation of this chapter may be made by any individual and shall be made to the administrator. Complaints shall include the name and address of the complainant and the alleged violator, and the violation alleged. If the alleged violation involves facility damage or a downtime event, the complaint must be submitted on such forms and contain such information as required by the board in rule. Upon review of the complaint, and any investigation conducted therewith, the administrator shall notify the person making the complaint and the alleged violator, in writing, of the administrator's recommended course of action to the board. The administrator shall recommend that a training course adopted by the board, by rule, be successfully completed for a first violation of this chapter, except that if the complaint is for a first violation of this chapter wherein a residential homeowner or residential tenant excavating on the lot of his residency failed to provide notice as required in *section 55-2205, Idaho Code*, and caused damage to underground facilities, the board shall direct the administrator to deliver to the violator a written warning and educational materials to prevent a future violation. The administrator may recommend the imposition of a civil penalty in an amount not to exceed one thousand dollars (\$1,000) for a second violation of this chapter and in addition may recommend successful completion of a training course adopted by the board, by rule, and issue a notice of intent to impose such penalty on behalf of the board. If the administrator recommends the imposition of a civil penalty, the violator may pay the fine to the board upon receipt of such notice. If, upon the expiration of twenty-one (21) days, the violator has not responded in writing to the division, the board may impose the penalty provided for in the notice. A violator shall also have the right to contest the imposition of a civil penalty to the board and the opportunity to produce evidence in his behalf. Notice of the time and place of such hearing shall be provided by the board, and such proceeding shall be governed by the provisions of *chapter 52, title 67, Idaho Code*.

(2) In the event the board determines that a person has violated the provisions of this chapter a subsequent time within eighteen (18) months from an earlier violation, and where facility damage has occurred, the board may impose a civil penalty of not more than five thousand dollars (\$5,000) for each separate violation in accordance with the process described in subsection (1) of this section.

(3) All civil penalties recovered shall be deposited in the underground facility damage prevention board fund and used pursuant to *section 55-2204 (2), Idaho Code*.

(4) The penalties provided in this section are in addition to any other remedy at law or equity available to any party subject to the jurisdiction of the damage prevention board established in *section 55-2203, Idaho Code*.

(5) Unless expressly provided herein, nothing in this chapter eliminates, alters or otherwise impairs common law, statutory or other preexisting rights and duties of persons affected by the provisions of this chapter; nor does anything in this chapter, unless expressly so provided, eliminate, alter or otherwise impair other remedies, state or federal, including those at common law, of an underground facility owner whose facility is damaged; nor do the provisions of this chapter affect any

civil remedies for personal injury or property damage except as expressly provided for herein. The court in its discretion may award attorney's fees and costs to the prevailing party.

**§ 55-2212. Waiver Permitted by Owner of Underground Facility.**

The notification and marking provisions of this chapter may be waived for one or more designated persons by an underground facility owner with respect to all or part of that underground facility owner's own underground facilities.