

CHAPTER 269E
ONE CALL CENTER; ADVANCE WARNING TO EXCAVATORS

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Note

Chapter repealed June 30, 2009. L 2004, c 141, §7.

L 2004, c 141, §5 provides:

"SECTION 5. Nothing in this chapter shall be deemed or construed to preempt any federal law or regulation governing subsurface installations subject to federal jurisdiction."

[§269E-1 Administration.] This chapter shall be administered by the public utilities commission and the provisions of this chapter and of chapter 269, not inconsistent with this chapter, shall govern its administration; provided that sections 269-7.5, 269-8.2, 269-8.5, 269-9, 269-16 to 269-28, 269-30, 269-31, 269-34 to 269-43, and 269-71 to 269-111 shall not, in any respect, apply to the one call center. [L 2004, c 141, pt of §1]

[§269E-2] Definitions. As used in this [chapter], unless the context clearly requires otherwise:

"Agency" means any state or county department, commission, board, bureau, office, or other establishment of the state or county government or semi-autonomous part thereof.

"Approximate location of subsurface installation" means a strip of land not more than thirty inches on either side of the exterior surface of the subsurface installation, and does not refer to the depth of the subsurface installation.

"Center" means the one call center.

"Commission" means the public utilities commission.

"Committee" means the one call center advisory committee.

"Damage" means:

(1) The substantial weakening of the structural or lateral support of a subsurface installation;

(2) The penetration or destruction of any protective coating, housing, or other protective device of a subsurface installation; or

(3) The partial or complete severance of a subsurface installation.

"Demolition" means the wrecking, razing, rendering, movement, or removal of a structure or mass of material by means of tools, equipment, or the placement and discharge of explosives.

"Emergency" means a sudden, unexpected occurrence involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of or damage to life, health, property, or essential public services.

"Excavation" means any operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means of tools, equipment, or explosives, including but not limited to the following: grading, trenching, digging, ditching, boring, drilling, auguring, tunneling, scraping cable or pipe plowing and driving, demolition, and dredging. "Excavation" shall not include any operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means of tools, equipment, or explosives as part of improving an existing principal place of residence for one or two families, or improving or constructing an appurtenance thereto, on a parcel of land two acres or less in size, zoned for residential use, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for one or two families.

"Excavator" means any person, including an operator, who performs any excavation, other than an operator whose employees are performing maintenance work on the operator's subsurface installation.

"Inquiry identification number" means the number issued by the center to every excavator who contacts the center for the purpose of excavating.

"One call center" means a private provider selected by the commission pursuant to section 269E-5 that provides advance warning to excavators of the location of subsurface installations in the area of an excavation for the purpose of protecting those installations from damage.

"Operator" means any person who owns, operates, or maintains a subsurface installation.

"Person" means any individual, firm, joint venture, partnership, corporation, association, agency, cooperative or joint stock association, contractor, subcontractor, operator, or other entity.

"Subsurface installation" means any pipeline, conduit, cable, duct, wire, sewer line, storm drain, vault, or other structure that is located underground.

"Working day" means every day from 7:00 a.m. to 5:00 p.m., except Saturday, Sunday, or any federal or state holiday. [L 2004, c 141, pt of §1]

[§269E-3] General duties and powers of the commission. The general duties and powers of the commission shall be to:

- (1) Establish and administer a one call center that provides advance warning to excavators in this State of the location of subsurface installations in the area of an excavation for the purpose of protecting those installations from damage;
- (2) Adopt, amend, or repeal rules pursuant to chapter 91 as it may deem necessary to effectuate this chapter. The rules adopted shall have the force and effect of law and may include but are not limited to rules that:
 - (A) Forbid acts or practices deemed by the commission to be detrimental to the accomplishment of the purposes of this chapter; and
 - (B) Require operators and excavators to make reports to the commission containing information that will enable the commission to improve the accomplishment of this chapter;
- (3) Enforce this chapter and any rules adopted pursuant thereto;
- (4) Issue binding interpretations or declaratory rulings, and conduct contested case proceedings pursuant to chapter 91; and
- (5) Subpoena witnesses and documents, administer oaths, and receive affidavits and oral testimony, including telephonic and electronic communications. [L 2004, c 141, pt of §1]

§269E-4 One call center advisory committee. (a) The commission shall establish a one call center advisory committee as a governmental entity as defined under chapter 662D to advise the commission in implementing this chapter. The committee shall consist of seventeen voting members and one ex officio nonvoting member. Of the voting members:

- (1) Eleven shall be appointed by the commission to serve until successors are appointed by the commission. The appointments shall be as follows:
 - (A) One from the gas utility industry;
 - (B) One from the electric utility industry;
 - (C) One from the telecommunications utility industry;
 - (D) One from the pipeline operator industry;
 - (E) Two from the General Contractors Association of Hawaii;
 - (F) Two from the Building Industry Association of Hawaii;
 - (G) One from the cable service industry;
 - (H) One from the water utility industry; and
 - (I) One from the wastewater industry;
- (2) One shall be the representative of the city and county of Honolulu designated by the mayor of the city and county of Honolulu;
- (3) One shall be the representative of the county of Hawaii designated by the mayor of the county of Hawaii;
- (4) One shall be the representative of the county of Maui designated by the mayor of the county of Maui;
- (5) One shall be the representative of the county of Kauai designated by the mayor of the county of Kauai;
- (6) One shall be the director of the state department of transportation, or the director's representative; and
- (7) One shall be the executive director of the division of consumer advocacy, department of commerce and consumer affairs, or the executive director's representative.

A representative of the center shall serve as an ex officio nonvoting member of the committee.

- (b) No member shall receive any compensation for the member's services.
- (c) The committee shall advise the commission on:
 - (1) The establishment of rules;
 - (2) The setting of appropriate fees and assessments for the administration and operation of the center;
 - (3) The selection of the center provider;
 - (4) The enforcement of this chapter; and
 - (5) Other aspects regarding the establishment and operation of the center;

provided that the committee shall not advise the commission in the exercise of the commission's quasi-judicial, adjudicatory functions, or participate in the commission's deliberations. The committee shall be exempt from chapter 92. [L 2004, c 141, pt of §1; am L 2006, c 95, §1]

[§269E-5] One call center established. (a) By January 1, 2006, the commission shall establish and begin administration of a one call center that provides advance warning to excavators in this State of the location of subsurface installations in the area of an excavation for the purpose of protecting those installations from damage. In establishing the center, the commission shall consider the availability of experienced center providers. The commission shall award administration of the center to the provider the commission determines to be best qualified to provide center services. In reviewing a provider's qualifications, the commission shall consider cost, quality of service, experience, and other factors the commission deems appropriate.

(b) Pursuant to rules adopted by the commission, all operators shall furnish to the center information relating to subsurface installations that the center may use to identify operators known to have subsurface installations in the area of a proposed excavation; provided that operators shall not be required to furnish to the center information relating to subsurface installations that are deemed confidential or proprietary. [L 2004, c 141, pt of §1]

[§269E-6] One call center financing. (a) To finance the establishment and operation of the center and the administrative costs of the commission, operators shall pay to the commission a fee in an amount and at a schedule determined by the commission. The commission may also assess fees on excavators. All fees paid by operators and excavators shall be deposited with the director of finance to the credit of the public utilities commission special fund.

(b) All operators of subsurface installations in this State shall share in the operational and administrative costs of the center, except where:

- (1) All of the operator's subsurface installations are located on property owned exclusively by that operator; and
- (2) The operator has not authorized another operator to use the property for any subsurface installation.

(c) The commission may accept revenues, compensations, proceeds, charges, penalties, grants, or any other payments in any form, from any public agency or any other source.

(d) Any agency required to participate may charge a reasonable fee in an amount sufficient to cover the administrative and operational costs required by this chapter.

(e) Civil penalties collected pursuant to this chapter shall be used by the commission to educate the operating and excavating community in Hawaii and to reduce the center's operating costs.

(f) Any operator or excavator that pays public utility fees to the commission pursuant to section 269-30 may petition the commission for approval to apply a portion of its public utility fee payments as a credit toward its center fees. [L 2004, c 141, pt of §1]

[§269E-7] Notification of excavation; inquiry identification number. (a) Except in an emergency, every excavator planning to conduct an excavation on public or private property shall notify the center of the excavation at least five working days but not more than twenty-eight calendar days prior to commencing excavation. The excavator shall provide to the center a description of the excavation site that includes the county, place, and address or description of where the excavation will take place, including but not limited to the nearest intersecting street, side of street, footages, or other tie-in measurements as needed. An excavator need not contact the center if the excavation is:

- (1) On private property that is owned exclusively by the excavator; and
- (2) No operator has been authorized to use the property for any subsurface installation.

(b) The center shall provide an inquiry identification number to an excavator who contacts the center and shall, on that same day, notify any operator known to have a subsurface installation in the area of the proposed excavation. The inquiry identification number shall remain valid for not more than twenty-eight calendar days from the date of issuance, and after that date shall require center revalidation. An excavator may revalidate the inquiry identification number by applying to the center for revalidation prior to expiration. The excavator shall maintain a valid inquiry identification number for the duration of the excavation.

(c) The center shall maintain a record of all notifications by and from excavators and operators for a period of not fewer than three years. [L 2004, c 141, pt of §1]

[§269E-8] Marking of excavation site. (a) The excavator shall delineate the area to be excavated with white spray chalk or other suitable markings prior to calling the center. The excavator shall indicate the entire dimension of the excavation by known industrial practices and display the excavator's name, abbreviations, or initials next to or in the white spray chalk markings to identify the excavation site.

(b) When an excavator delineates an area to be excavated with white spray chalk, the excavator shall delineate the area in a manner that shall not be:

- (1) Misleading to the public using affected streets and highways;
- (2) Subject to misinterpretation as a traffic or pedestrian control; and
- (3) Construed as duplicative.

(c) Where an excavator determines that delineating with white spray chalk may be misleading, misinterpreted, or duplicative as specified under subsection (b), the excavator shall inform the center that the area to be excavated shall instead be identified with flags, stakes, or stake chasers marked with the excavator's name, abbreviations, or initials, to enable the operator to determine the area of excavation. [L 2004, c 141, pt of §1]

[§269E-9] Identification of subsurface installations by operator. (a) Any operator who receives timely notification from the center of any proposed excavation work pursuant to section 269E-7(b) shall within five working days of that notification or before the start of the excavation work, whichever is later, or at a later time mutually agreeable to the operator and the excavator:

- (1) Advise the excavator that the operator does not operate any subsurface installations that may be affected by the excavation;
- (2) Advise the excavator of the approximate location of the operator's subsurface installations that may be affected by the excavation to the extent and degree of accuracy that the information is available in the records of the operator;
- (3) Make available to the excavator, for inspection and copying at the excavator's expense, information in that specific operator's or agency's records on the approximate location of that specific operator's or agency's subsurface installations that may be affected by the excavation to the extent and degree of accuracy that the information is available in that specific operator's or agency's records; or
- (4) Locate and field mark in conformance with the American Public Works Association Uniform Color Code the approximate location and the number of subsurface installations that may be affected by the excavation to the extent and degree of accuracy that the information is available as determined through the use of standard locating techniques or based on the records of the operator.

The operator shall promptly notify the center when the operator has fulfilled the requirements of this section. After receiving this notification from all affected operators, the center shall promptly provide notice to the excavator that all affected operators have fulfilled the requirements of this section.

(b) The excavator shall notify the center of any operator's failure to comply with this section and of the applicable inquiry identification number. [L 2004, c 141, pt of §1]

[§269E-10] Commencement of excavation. The center shall not prohibit an excavator from beginning excavation work:

- (1) After receiving notice that all affected operators have fulfilled the requirements of section 269E-9; or
- (2) Five working days after the excavator provides notice of the excavation to the center pursuant to section 269E-7(a); provided that this subsection shall not be construed as affording the excavator any immunity or protection from claims for damages or injuries relating to the excavation. [L 2004, c 141, pt of §1]

[§269E-11] Remarketing of operator's subsurface installation. (a) The excavator shall take reasonable care to maintain an operator's field markings.

(b) If at any time during an excavation for which there is a valid inquiry identification number an operator's field markings are no longer reasonably visible, the excavator shall shut down the excavation and contact the center and request remarketing of the subsurface installations. The center shall, on the same day, contact the operator and request remarketing.

(c) Upon receiving timely renotification pursuant to this section, the operator shall within five working days, and to the extent necessary, remark those subsurface installations that may be affected by the excavation in conformance with section 269E-9(a)(4). The operator shall promptly notify the center when the requirements of this section are fulfilled.

(d) The excavator may continue excavation:

- (1) After the center notifies the excavator that the operator has fulfilled the requirements of section 269E-11(c); or
- (2) Five working days after the excavator requests remarketing pursuant to section 269E-11(b); provided that this subsection shall not be construed as affording the excavator any immunity or protection from claims for damages or injuries relating to the excavation.

(e) If the excavator maintains the operator's field markings, then the excavator, when extending a location request ticket through the center, shall not request the operator to remark the operator's subsurface installations.

(f) The excavator shall notify the center of any operator's failure to comply with this section and of the applicable inquiry identification number.

(g) This section shall not apply to operators who comply with section 269E-9(a)(1), (2), or (3). [L 2004, c 141, pt of §1]

[§269E-12] Excavation procedures. (a) The excavator shall exercise reasonable care when excavating in the vicinity of a subsurface installation.

(b) Before using any power-operated or power-driven excavating equipment, the excavator shall determine the exact location of subsurface installations in conflict with the excavation by first excavating down to the depth of the excavation with the appropriate hand tools within the area of

the approximate location of the subsurface installations; provided that power-operated or power-driven excavating may be used:

- (1) For the removal of any existing pavement if there are no subsurface installations contained in the pavement; or
 - (2) Within the approximate location of a subsurface installation by mutual agreement between the operator and the excavator.
- (c) If after making every reasonable effort to locate the subsurface installation, the excavator cannot determine the exact location by hand excavation as set forth in subsection (b), the excavator shall request that the operator provide additional information through the center to locate the subsurface installation. The operator, within two working days, shall provide any information that is available to the operator to aid the excavator in determining the exact location.
- (d) If after making every reasonable effort to locate the subsurface installation with the additional information provided pursuant to subsection (c) the excavator still cannot determine the exact location of the subsurface installation by hand excavation, the excavator shall notify the center. The center shall then:
- (1) Require the operator to determine the exact location of the operator's subsurface installation with appropriate hand tools; or
 - (2) Allow the excavator to use powered equipment to continue the excavation, with or without on-site supervision by the operator; provided that this subsection shall not be construed as affording the excavator any immunity or protection from claims for damages or injuries relating to the excavation.
- (e) Each excavator responsible for any excavation that results in contact with, exposure of, or damage to a subsurface installation, before continuing excavation in the immediate area of the subsurface installation shall:
- (1) Immediately notify the operator of the location and nature of the damage and undertake any reasonable measures as requested by the operator; and
 - (2) Allow reasonable time, consistent with industry practice, for any necessary repairs to be made to the subsurface installation.
- (f) If the damage to a subsurface installation creates an emergency situation, the excavator shall:
- (1) Immediately notify the enhanced 911 emergency service and the operator of the facility; and
 - (2) Minimize the hazard until the arrival of the enhanced 911 emergency service authority or the operator. [L 2004, c 141, pt of §1]

[§269E-13] Excavation permits. Prior to conducting an excavation, the excavator shall obtain all necessary permits from the appropriate agency or agencies pursuant to the laws, rules, regulations, procedures, and requirements governing the issuance of such permits. [L 2004, c 141, pt of §1]

- [§269E-14] Penalties.** (a) An action for the enforcement of penalties pursuant to this chapter shall be brought before the commission by the State, county, excavator, or any operator.
- (b) Any excavator or operator who negligently violates, neglects, or fails in any particular instance to conform to or comply with any requirement of this chapter or any order or rule of the commission:
- (1) Shall be subject to a civil penalty not to exceed \$5,000 per day for each day such violation, neglect, or failure continues, to be assessed by the commission after a hearing in accordance with chapter 91; provided that the maximum penalty for related violations arising out of the same act, omission, or occurrence shall not exceed \$100,000; and
 - (2) May be required, at the expense of the violator, to participate in an educational program conducted by the center; provided that any excavator who negligently violates section 269E-7(a) shall be required, at the expense of the excavator, to participate in an educational program conducted by the center.
- (c) Upon written application filed within fifteen days after service of an order imposing a civil penalty pursuant to this section, the commission may remit or mitigate such penalty upon such terms as it deems proper. In determining whether such penalty should be remitted or mitigated, the commission may consider:
- (1) The gravity of the violation;
 - (2) Whether the excavator or operator charged with the violation attempted in good faith to comply with this chapter, before and after notification of the violation; and
 - (3) Any history of previous violations of this chapter by the operator or excavator.
- (d) If any penalties imposed pursuant to this section are not paid or complied with within such period as the commission may direct, the attorney general shall institute a civil action in circuit court for compliance of the same.
- (e) In addition to civil penalties imposed, the nonprevailing party shall reimburse the prevailing party for legal fees and costs incurred by the prevailing party.
- (f) Notwithstanding any other law to the contrary, this chapter shall not affect any remedies, civil or criminal, otherwise provided by law. This chapter, and compliance therewith, shall not be construed as altering or mitigating any liabilities, responsibilities, or obligations

imposed by law, rule, agreement, or contract, or as affording any immunity or protection from claims for injuries or damages relating to the excavation. This chapter does not expressly transfer, and shall not be deemed to imply the transfer of, any liability between operators and excavators. No insurance policy shall provide coverage for any civil penalties imposed under this chapter. [L 2004, c 141, pt of §1]

[§269E-15] Hearings. (a) All hearings, investigations, and proceedings shall be governed by this section, chapter 91, and by rules of practice and procedure adopted by the commission, and in the conduct thereof, the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding, or in the manner of taking testimony shall invalidate any order, decision, or rule made, approved, or confirmed by the commission.

(b) Complaints may be made, in writing, by the commission on its own motion or by the State, county, excavator, or any operator, setting forth any act or thing done, or omitted to be done by any excavator or operator in violation or claimed to be in violation, of any requirement of this chapter or of any order or rule of the commission.

(c) All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the commission, the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

(d) Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the operator or excavator complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in any proceeding before the courts of this State, and may be made personally or by mailing in a sealed envelope, registered or certified, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than fifteen days before the time set for the hearing.

(e) At the time fixed for any hearing before the commission or the time to which the hearing has been continued, the complainant and the person complained of, and such persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision which shall be based on findings of fact and conclusions of law therein stated. A copy of each order shall be served upon the person complained of, or the person's attorney.

(f) A complete record of all proceedings and testimony before the commission on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of the testimony, together with all exhibits or copies thereof introduced, and of the pleadings, records, and proceedings in the cause, shall constitute the record of the commission, but the party or parties to the proceeding and the commission may stipulate that designated parts of the record need not be transmitted to the appellate court, as provided by the rules of the court. [L 2004, c 141, pt of §1]

[§269E-16] Reconsideration and rehearings. After any order or decision has been made by the public utilities commission, any party to the proceeding may apply once for reconsideration or a rehearing in respect to any matter determined in the proceeding and specified in the motion for reconsideration or rehearing. The motion for reconsideration or a rehearing shall be filed within ten days after the decision and order has been served and shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No person shall in any court urge or rely on any ground not so set forth in the motion. A motion for reconsideration or rehearing shall not excuse any person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs. If, after reconsideration or rehearing the commission is of the opinion that the original order or decision, or any part thereof, is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify it. The order or decision abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission. [L 2004, c 141, pt of §1]

[§269E-17] Appeals. From the order made on an application for reconsideration or rehearing by the public utilities commission under this chapter, an appeal shall lie in the manner provided in section 269-15.5. [L 2004, c 141, pt of §1]