

As Amended by Senate Committee

As Amended by House Committee

Session of 2019

HOUSE BILL No. 2178

By Committee on Judiciary

2-7

1 AN ACT concerning utilities; relating to the Kansas underground utility
2 damage prevention act; definitions; location of facilities and duty to
3 mark, exceptions; amending K.S.A. 66-1802, **66-1805** and 66-1806 and
4 repealing the existing sections.
5

6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 66-1802 is hereby amended to read as follows: 66-
8 1802. As used in this act:

9 (a) "Damage" means any impact or contact with an underground
10 facility, its appurtenances or its protective coating, or any weakening of the
11 support for the facility or protective housing which requires repair.

12 (b) **"Electric public utility" means the same as such term is**
13 **defined in K.S.A. 66-101a, and amendments thereto.**

14 (c) "Emergency" means any condition constituting a clear and present
15 danger to life, health or property, or a customer service outage.

16 ~~(e)~~(d) "Excavation" means any operation in which earth, rock or
17 other material below the surface is moved or otherwise displaced by any
18 means, except tilling the soil for normal agricultural purposes, or railroad
19 or road and ditch maintenance that does not change the existing railroad
20 grade, road grade and/or ditch flowline, or operations related to
21 exploration and production of crude oil or natural gas, or both.

22 ~~(d)~~(e) "Excavator" means any person who engages directly in
23 excavation activities within the state of Kansas, but shall not include any
24 occupant of a dwelling who: (1) Uses such dwelling as a primary
25 residence; and (2) excavates on the premises of such dwelling.

26 ~~(e)~~(f) "Facility" means any sanitary sewer or underground line,
27 system or structure used for transporting, gathering, storing, conveying,
28 transmitting or distributing potable water, gas, electricity, communication,
29 crude oil, refined or processed petroleum, petroleum products or hazardous
30 liquids; facility shall not include, any stormwater sewers or production
31 petroleum lead lines, salt water disposal lines or injection lines, which are
32 not located on platted land or inside the corporate limits of any city.

1 ~~(f)~~(g) "Locatable facility" means facilities for which the tolerance
2 zone can be determined by the operator using generally accepted practices
3 such as as-built construction drawings, system maps, probes, locator
4 devices or any other type of proven technology for locating.

5 ~~(g)~~(h) "Marking" means the use of stakes, paint, flags or other clearly
6 identifiable materials to show the field location of underground facilities,
7 in accordance with the rules and regulations promulgated by the state
8 corporation commission in the administration and enforcement of this act.

9 ~~(h)~~(i) "Municipality" means any city, county, municipal corporation,
10 public district or public authority located in whole or in part within this
11 state which provides firefighting, law enforcement, ambulance, emergency
12 medical or other emergency services.

13 ~~(i)~~(j) "Notification center" means the statewide communication
14 system operated by an organization which has as one of its purposes to
15 receive and record notification of planned excavation in the state from
16 excavators and to disseminate such notification of planned excavation to
17 operators who are members and participants.

18 ~~(j)~~(k) "Operator" means any person who owns or ~~operates~~ leases an
19 underground tier 1 or tier 2 facility, ~~except for: "Operator" does not~~
20 ~~mean, except for~~ any person who is:

21 ~~(1)~~ the owner of real property wherein is located underground
22 facilities for the purpose of furnishing services or materials only to such
23 person or occupants of such property; ~~or,~~

24 ~~(2)~~ ~~providing electric service for that~~ **An electric public utility shall**
25 **not be considered an operator of any** ~~portion of an underground facility~~
26 ~~downstream~~ **{that is on another person's side}** of the point where
27 ownership of the facility changes from ~~the operator~~ **an** ~~{the}~~ **electric**
28 **public utility** to another person as determined by the ~~operator's~~ **electric**
29 **public utility's** rules and regulation, tariffs, service or membership
30 agreement or other similar documents.

31 ~~(k)~~(l) "Preengineered project" means a public project or a project
32 which is approved by a public agency wherein the public agency
33 responsible for the project, as part of its engineering and contract
34 procedures, holds a meeting prior to the commencement of any
35 construction work on such project in which all persons, determined by the
36 public agency to have underground facilities located within the
37 construction area of the project, are invited to attend and given an
38 opportunity to verify or inform the public agency of the location of their
39 underground facilities, if any, within the construction area and where the
40 location of all known and underground facilities are duly located or noted
41 on the engineering drawing as specifications for the project.

42 ~~(l)~~(m) "Permitted project" means a project where a permit for the
43 work to be performed must be issued by a city, county, state or federal

1 agency and, as a prerequisite to receiving such permit, the applicant must
2 locate all underground facilities in the area of the work and in the vicinity
3 of the excavation and notify each owner of such underground facilities.

4 ~~(m)~~(n) "Person" means any individual, partnership, corporation,
5 association, franchise holder, state, city, county or any governmental
6 subdivision or instrumentality of a state and its employees, agents or legal
7 representatives.

8 ~~(n)~~(o) "Production petroleum lead line" means an underground
9 facility used for production, gathering or processing on the lease or unit, or
10 for delivery of hydrocarbon gas and/or liquids to an associated tank
11 battery, separator or sales facility. Production petroleum lead lines shall
12 include underground lines associated with lease fuel and saltwater disposal
13 and injection.

14 ~~(o)~~(p) "Platted land" means a tract or parcel of land which has been
15 subdivided into lots of less than five acres for the purpose of building
16 developments, including housing developments, and for which a
17 surveyor's plat has been filed of record in the office of the register of deeds
18 in the county where the land is located.

19 ~~(p)~~(q) "Tier 1 facility" means an underground facility used for
20 transporting, gathering, storing, conveying, transmitting or distributing
21 gas, electricity, communications, crude oil, refined or reprocessed
22 petroleum, petroleum products or hazardous liquids.

23 ~~(q)~~(r) "Tier 2 facility" means an underground facility used for
24 transporting, gathering, storing, conveying, transmitting or distributing
25 potable water or sanitary sewage.

26 ~~(r)~~(s) "Tier 3 facility" means a water or wastewater system utility
27 which serves more than 20,000 customers who elects to be a tier 3 member
28 of the notification center pursuant to this subsection. The operator of a tier
29 3 facility shall:

30 (1) Develop and operate a locate service website capable of receiving
31 locate requests;

32 (2) publish and maintain a dedicated telephone number for locate
33 services;

34 (3) maintain 24-hour response capability for emergency locates; and

35 (4) employ not less than two individuals whose primary job function
36 shall be the location of underground utilities. Operators of tier 3 facilities
37 shall make either such website or contact information available to the
38 notification center. The notification center shall collect and charge a fee of
39 \$500 a year for each tier 3 facility. No other fee, charge or cost shall be
40 assessed to a tier 3 facility by the notification center. Tier 3 members shall
41 be subject to all provisions of K.S.A. ~~66-1805 through 66-1810~~ *66-1801 et*
42 *seq.*, and amendments thereto.

43 ~~(s)~~(t) "Tolerance zone" means the area not less than 24 inches of the

1 outside dimensions in all horizontal directions of an underground facility,
2 except that a larger tolerance zone for a tier 1, 2 or 3 facility may be
3 established by rules and regulations adopted under K.S.A. 66-1815, and
4 amendments thereto. An operator of a water or wastewater facility may
5 elect to use a tolerance zone for such water or wastewater facility in which
6 tolerance zone means the area not less than 60 inches of the outside
7 dimensions in all horizontal directions of an underground water or
8 wastewater facility upon notification of the excavator, except that a larger
9 tolerance zone may be established by rules and regulations adopted under
10 K.S.A. 66-1815, and amendments thereto.

11 ~~(u)~~(u) "Update" means an additional request from the excavator to
12 extend the time period of the request for intent to excavate beyond the 15
13 calendar day duration of the request.

14 ~~(v)~~(v) "Whitelining" means the act of marking by the excavator the
15 route or boundary of the proposed excavation site with white paint, white
16 stakes or white flags.

17 ~~(w)~~(w) "Working day" means every day Monday through Friday
18 beginning at 12:01 a.m., except for the following officially recognized
19 holidays: New Year's day, Memorial day, Independence day, Labor day,
20 Thanksgiving day, the day after Thanksgiving and Christmas.

21 ***Sec. 2. K.S.A. 66-1805 is hereby amended to read as follows: 66-***
22 ***1805. (a) This act recognizes the establishment of a single notification***
23 ***center for the state of Kansas. Each operator who has an underground***
24 ***facility shall become a member of the notification center.***

25 ***(b) For operators of tier 1 facilities or operators of tier 2 facilities***
26 ***that desire notification in the same manner as operators of tier 1***
27 ***facilities, the notification center shall provide prompt notice of any***
28 ***proposed excavation to each affected operator that has facilities***
29 ***recorded with the notification center in the area of a proposed***
30 ***excavation site.***

31 ***(c) For operators of tier 2 facilities that desire direct contact with***
32 ***the excavator, the notification center shall provide the excavator with the***
33 ***name and contact information of the affected operator that has facilities***
34 ***recorded with the notification center in the area of the proposed***
35 ***excavation.***

36 ***(d) Notification to operators as defined in subsection (b) shall be***
37 ***given by notifying the notification center by telephone at the toll free***
38 ***number or by other communication methods approved by the***
39 ***notification center. The content of such notification shall be as required***
40 ***by K.S.A. 66-1804, and amendments thereto.***

41 ***(e) Notification to operators as defined in subsection (c) may be***
42 ***given by notifying the operator of tier 2 facilities using the contact***
43 ***information provided by the notification center. The content of such***

1 *notification shall be as required by K.S.A. 66-1804, and amendments*
2 *thereto.*

3 *(f) Each operator who has an underground facility within the state*
4 *shall be afforded the opportunity to become a member of the notification*
5 *center on the same terms as the original members.*

6 *(g) A suitable record shall be maintained by the notification center*
7 *to document the receipt of notices from excavators as required by this*
8 *act.*

9 *(h) A suitable record shall be maintained by operators of tier 2*
10 *facilities that desire direct contact with the excavator pursuant to*
11 *subsection (c) to document the receipt of notices from excavators.*

12 *(i) The notification center shall charge and collect an annual*
13 *membership fee in the amount of \$25 from each tier 2 facility member.*

14 *(j) The notification center shall charge a referral fee to tier 2*
15 *facility members in an amount no more than 50% of the referral fee rate*
16 *charged to tier 1 facility members.*

17 *(k) Upon request of the operator, the person filing the notice of*
18 *intent to excavate shall whitelist the proposed excavation site prior to*
19 *locates being performed.*

20 *(l) The notification center established pursuant to this section shall*
21 *be and is hereby deemed to be a public agency and shall be subject to the*
22 *provisions of the open records act, K.S.A. 45-215 et seq., and*
23 *amendments thereto, and the open meetings act, K.S.A. 75-4317 et seq.,*
24 *and amendments thereto, except that the notification center or board of*
25 *directors, or successor managing organization shall not disseminate,*
26 *make available or otherwise distribute data or information provided by*
27 *an operator of a tier 1, 2 or 3 facility unless such dissemination, making*
28 *available or distributing is necessary for the state corporation*
29 *commission or the notification center to carry out legal duties or specific*
30 *statutory duties prescribed under this chapter.*

31 *(m) On and after July 1, 2009, the notification center's board of*
32 *directors shall include two members from tier 2 facilities and ~~one~~*
33 *member from tier 3 facilities.*

34 *(n) The notification center shall prepare an annual report which*
35 *describes the activities of such center. An annual audit of the*
36 *notification center shall be conducted by an independent certified public*
37 *accountant. The notification center shall provide copies of such reports*
38 *to each member of the notification center and shall be subject to the*
39 *open records act, K.S.A. 45-215 et seq., and amendments thereto.*

40 *(o) The notification center shall solicit proposals for operation of*
41 *the notification center not more than every five years which shall be*
42 *awarded in an open meeting by the board of directors of the notification*
43 *center. The bidding process prescribed by this subsection shall be subject*

1 *to the open records act, K.S.A. 45-215 et seq., and amendments thereto.*

2 *(p) The notification center shall conduct a cost of service audit not*
3 *more than every five years or as otherwise requested by the board of*
4 *directors of the notification center or a majority of the members of such*
5 *center.*

6 *(q) On and after July 1, 2019, the notification center shall notify any*
7 *person or excavator requesting identification of the location of*
8 *underground facilities that utilities are only required to identify the*
9 *location of utility-owned facilities and are not required to identify the*
10 *location of privately owned facilities.*

11 Sec. 2. 3. K.S.A. 66-1806 is hereby amended to read as follows: 66-
12 1806. (a) Within two working days, beginning on the later of the first
13 working day after the excavator has filed notice of intent to excavate or the
14 first day after the excavator has whitelined the excavation site, an operator
15 served with notice, unless otherwise agreed between the parties, shall
16 inform the excavator of the tolerance zone of the underground facilities of
17 the operator in the area of the planned excavation by marking, flagging or
18 other acceptable method.

19 (b) If the operator of tier 2 facilities cannot accurately mark the
20 tolerance zone, such operator shall mark the approximate location to the
21 best of its ability, notify the excavator that the markings may not be
22 accurate, and provide additional guidance to the excavator in locating the
23 facilities as needed during the excavation.

24 (c) The operator of tier 2 facilities shall not be required to provide
25 notification of the tolerance zone for facilities which are at a depth at least
26 two feet deeper than the excavator plans to excavate but does have to
27 notify the excavator of their existence.

28 (d) (1) If the operator of a tier 1 facility has no underground facilities
29 in the area of the proposed excavation, such operator, before the
30 excavation start date, shall notify the excavator that it has no facilities in
31 the area of proposed excavation by telephone, facsimile, marking the area
32 all clear or by other technology that may be developed for such purposes.

33 (2) *If the operator of a tier 1 facility is a provider of electricity, the*
34 *duty of the operator to mark shall not extend ~~downstream~~ {to another*
35 *person's side} of the point where ownership of the facility changes from*
36 *the operator to another person as determined by the operator's rules and*
37 *regulations, tariffs, service or membership agreements or other similar*
38 *documents.*

39 (e) If the excavator notifies the notification center, within two
40 working days after the initial identification of the tolerance zone by the
41 operator, that the identifiers have been improperly removed or altered, the
42 operator shall make a reasonable effort to reidentify the tolerance zone
43 within one working day after the operator receives actual notice from the

1 notification center.

2 (f) If the excavator has provided notice to an operator pursuant to
3 K.S.A. 66-1804, and amendments thereto, and the operator fails to comply
4 with subsections (a), (b) or (c) or notifies the excavator that it has no
5 underground facilities in the area of the planned excavation, the excavator
6 may proceed and shall not be liable to the operator for any direct or
7 indirect damages resulting from contact with the operator's facilities,
8 except that nothing in this act shall be construed to hold any excavator
9 harmless from liability to the operator in those cases of gross negligence or
10 willful and wanton conduct.

11 (g) For economic damages in any civil court of this state, failure of an
12 operator to inform the excavator within two working days of the tolerance
13 zone of the underground facilities of the operator in the manner required
14 by ~~subsection (a)~~ of K.S.A. 66-1806(a), and amendments thereto, shall not
15 give rise to a cause of action on the part of the excavator against an
16 operator, except that nothing in this act shall be construed to hold any
17 operator harmless from liability in those cases of inaccurate marking of the
18 tolerance zone, gross negligence or willful and wanton conduct. Such
19 failure may subject an operator to civil penalties as determined by the state
20 corporation commission.

21 (h) Any person claiming that an operator has failed to inform the
22 excavator within two working days of the tolerance zone of the
23 underground facilities of the operator shall file a complaint with the state
24 corporation commission requesting enforcement of subsection (a) within
25 one year of becoming aware of the violation.

26 (i) All tier 1 facilities installed by an operator after January 1, 2003,
27 shall be locatable.

28 (j) All tier 2 facilities installed by an operator after July 1, 2008, shall
29 be locatable.

30 ~~Sec. 3.~~ **4.** K.S.A. 66-1802, ~~66-1805~~ and 66-1806 are hereby repealed.

31 ~~Sec. 4.~~ **5.** This act shall take effect and be in force from and after its
32 publication in the Kansas register.