



Rob McKenna


## ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

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TO: Steve King, Director  
Safety & Consumer Protection  
Utilities & Transportation Commission

FROM: Donald T. Trotter, Senior Counsel   
Office of the Attorney General  
Utilities & Transportation Division

SUBJECT: RCW 19.122: Definition of "Excavator" and "Owner of Underground Facilities"

### Summary

RCW 19.122.030 requires that before an "excavator" commences any excavation (excluding agricultural tilling less than twelve inches deep), the excavator must provide notice to all "owners of underground facilities," by means of a one-number locator service established via RCW 19.122.027.

You have asked for my opinion regarding what entities are included as an "excavator" and an "owner of underground facilities" for purposes of RCW 19.122. In particular, you request that I focus on governmental entities such as a city, town, county, state agency or other governmental entity. The issues are:

- (1) When a city, town, county, state agency or other governmental entity commences an excavation, is it considered an "excavator" for purposes of RCW 19.122?
- (2) When a city, town, county, state agency or other governmental entity owns and uses a utility facility or pipeline located underground (e.g., water pipe, sewer pipe, gas pipe or buried electrical wire), is that entity considered an "owner of underground facilities" for purposes of RCW 19.122?

For the reasons stated below, I conclude that the Legislature has defined "excavator" broadly enough to encompass a city, town, county, state agency or other governmental entity. Consequently, unless one of the limited exemptions applies, RCW 19.122 requires such entities to provide notice to the owner of underground facilities prior to conducting an excavation. Similarly, RCW 19.122 also considers such entities to be "owners of underground facilities" for purposes of RCW 19.122, when they own underground utility facilities of the sort described in



the statute. As such, RCW 19.122 requires them to promptly mark the location of the facilities, once they receive a notice of excavation pursuant to that statute.

RCW 19.122 contains certain exemptions which, if applicable, limit the governmental entities' obligations or duties under that chapter. However, these exemptions are rather limited in scope; there is no blanket exemption to governmental entities that excavate or own underground utility facilities.

### Analysis

RCW 19.122 is often called the "Call Before You Dig" law. In general, before someone digs into the ground, they must call a "one-number locator service" and have the owner of the underground facilities mark those facilities, so the excavator can avoid damaging them. The obvious (and stated) purpose of the law is to prevent damage to underground utilities, and thus protect the public interest by preventing harm to the public via an explosion, electrical shock, flooding, interruption of utility service, etc. RCW 19.122.010.

The essence of the law is found in RCW 19.122.030 and .033, which require an "excavator" to notify "all owners of underground facilities" and "pipeline companies," respectively, prior to excavation, through a one-number locator service. RCW 19.122.030(1), .033(1) (by reference to .030). The owners of underground facilities and the pipeline companies are correspondingly required to subscribe to the one-number locator service. RCW 19.122.030(2).

The key statutory terms regarding the statute's coverage are "excavator" and "owner of underground facilities." I analyze each term separately.

**"Excavator."** The statute defines "excavator" in a broadly inclusive way: "any person who engages directly in excavation." RCW 19.122.020(6). This broad scope is carried through the definition of "person" and "excavation." "Person" means "an individual, partnership, franchise holder, association, corporation, a state, a city, a county, or any subdivision or instrumentality of a state, and its employees, agents, or legal representatives." RCW 19.122.020(16). "Excavation" means "any operation in which earth, rock, or other material is on or below the ground is moved or otherwise displaced by any means ...". RCW 19.122.020(4). Thus, RCW 19.122 applies to most entities that excavate or own underground utility facilities.

As to governmental entities, the terms "state," "city" and "county" used in the definition or "person" are well understood. The more general terms "subdivision [of the state]" and "instrumentality of the state" are not defined in RCW 19.122, but these are broad terms that typically include municipal corporations (a term that includes public utility districts (PUDs),<sup>1</sup> water districts,<sup>2</sup> port districts,<sup>3</sup> and similar governmental entities the Legislature has created or

<sup>1</sup> "Municipal corporations, to be known as public utility districts, are hereby authorized ...". RCW 54.04.020.

<sup>2</sup> A water-sewer district, once formed, becomes "a municipal corporation of the state ...". RCW 57.04.060.

<sup>3</sup> Once formed, a port district becomes "a municipal corporation of the state...". RCW 53.04.060.

has authorized to be created). As the court stated in *Board Against Discrimination v. Board of Directors, Olympia School District No. 1*, 68 Wn.2d 262, 269, 412 P.2d 769 (1969):

The power of the legislature over political or civil subdivisions of the state is plenary unless restrained by a provision of the constitution. In Rhyne, *Municipal Law* (1957), this rule is stated in chapter 4, § 4-2:

Municipal corporations are political subdivisions of the state, and in the absence of constitutional restrictions, the legislature has absolute control over the number, nature, and duration of the powers conferred, and the territory over which they shall be exercised, and may qualify, enlarge, abridge, or entirely withdraw at its pleasure the powers of a municipal corporation. (Footnotes omitted.)

This court has so held in the following cases: *Wheeler School Dist. v. Hawley*, 18 Wn.2d 37, 137 P.2d 1010 (1943); *State ex rel. Bd. of Comm'rs v. Clausen*, 95 Wash. 214, 163 P. 744 (1917); *Kitsap Cy. v. Bremerton*, 46 Wn.2d 362, 281 P.2d 841 (1955).

A state agency would be considered an "instrumentality of the state" for purposes of RCW 19.122.020(16) because the state government is operated through duly established state agencies, i.e., the state's "instrumentalities." Similar to municipal corporations, state agencies are created by the Legislature, and are subject to Legislative control.

Therefore, based on the plain meaning of the terms in RCW 19.122.030, through consideration of the definitions in RCW 19.122.020, I conclude that state agencies, cities, counties, PUDs, and similar municipal corporations are included in the term "excavators" for purposes of RCW 19.122 and are required to use the one-call service, unless an exemption applies.

**"Owner of Underground Facilities."** The statute does not define "owner." However, the plain meaning of the term "owner" is "one who has the legal and rightful title." *Webster's 3<sup>rd</sup> Int'l Dictionary* (1968) at 1612.

The term "underground facilities" is defined to generally include underground utility-related infrastructure and transportation pipeline facilities. RCW 19.122.020(22). The term includes "any item placed below ground for use in connection with the storage or conveyance" of most (if not all) of the common utility services (electric, water, sewer, telephone, cable, gas) as well as hazardous liquid and other pipelines. *Id.* This encompasses virtually all (if not all) utility and pipeline underground facilities, as long as they are in use.<sup>4</sup>

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<sup>4</sup> I do not intend the word "in use" to mean constant use. For example, a pipeline may have a storage tank that is used once a week. If it was not filled on the day an excavator struck it, without calling the one-call locator service, the excavator could not successfully argue that the facility was not in use; therefore, it was not an underground facility for purposes of RCW 19.122. On the other hand, a utility facility abandoned in place likely would not be considered an underground facility for purposes of RCW 19.122.

Thus, I conclude that any entity that has legal title to an underground facility used in utility service or pipeline service must subscribe to the one-number locate service, and mark the facilities upon the request of an excavator, pursuant to the procedures identified in the statute.

My conclusion is confirmed by *Employco Personnel Services, Inc. v. City of Seattle*, 117 Wn.2d 606, 817 P.2d 1373 (1991). In that case, several business customers of the Seattle's City Light Department sued Seattle and a contractor for consequential damages arising from an electrical outage. The outage was caused by an underground fire that ignited when the contractor drove steel piles into two City-owned electric utility conduits. The contractor had submitted locate requests with the City. However, the City failed to mark the two conduits.

The City attempted to avoid liability by asserting protection from a provision of the Seattle Municipal Code that purported to immunize the City from such losses. However, the court ruled that the City could not escape liability because the code provision "is in conflict with state statutes ... which authorize such suits and permit recovery of damages for negligently caused losses." 117 Wn.2d at 618. The court referred to the liability provisions of RCW 19.122.040 and RCW 80.04.440 as the statutes that prevailed over Seattle's conflicting city ordinance. *Id.* n.27.

As to the application of RCW 19.122 to the City as an owner of underground facilities, the court was unequivocal: "RCW 19.122 imposes upon the City the duty to mark its underground utilities and imposes liability for breach of that duty. The chapter explicitly includes 'a state, a city, a county, or any subdivision or instrumentality of a state' as subject to its provision. It renders them liable for any damages caused by their failure to locate and mark their underground facilities as required by the statute." *Id.* at 614 (citations omitted).<sup>5</sup>

I also note that in *Employco*, eight PUDs<sup>6</sup> filed *amicus* briefs on behalf of the City's position, which was rejected by the court. Had RCW 19.122 not applied to them, they would have had no interest in that litigation.<sup>7</sup>

**Statutory Exemptions.** RCW 19.122 contains some explicit exemptions:

*Three limited types of excavations are exempt from RCW 19.122.*

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<sup>5</sup> RCW 19.122 has been amended in the years the *Employco* decision. However, none of the amendments affected the application of the statute to cities and other municipal corporations or governmental entities.

<sup>6</sup> The eight PUDs are: PUD No. 1 of Chelan County, PUD No. 1 of Snohomish County, PUD No. 1 of Franklin County, PUD No. 1 of Mason County, PUD No. 3 of Mason County, PUD No. 1 of Benton County, PUD No. 1 of Grays Harbor County, and PUD No. 1 of Okanogan County.

<sup>7</sup> I reviewed the briefs of the parties to the supreme court in *Employco*. Neither the City of Seattle nor any of the amici PUDs argued that RCW 19.122 did not apply because they were not subject to UTC jurisdiction. Moreover, Chelan County PUD's brief stated at page 2 that the PUD was a member of the Chelan/Douglas Utilities Council which "utilizes a one number call system to implement the requirements of [RCW 19.122]." At page 18, Chelan argued that *Employco's* interpretation of the statute would "impose a burden on owners of underground utilities, such as Chelan ...". I view this as strong evidence that these PUDs believed they are subject to RCW 19.122.

The first exemption is agricultural tilling less than twelve inches in depth. This sort of excavation is excluded from the definition of "excavation" in RCW 19.122.020(4). It is also noted as an exclusion in RCW 19.122.030(1) and .033(1).

The second exempt excavation is for "road and ditch maintenance that does not change the original road grade or ditch flowline." This type of excavation is excluded from the definition of "excavation" in RCW 19.122.020(4).

The third type is an excavation less than twelve inches in depth on non-commercial property, conducted by the property owner/occupier. RCW 19.122.060.

Obviously, these exemptions are rather limited in scope, but if they apply, the excavator is not required to notify the one-number locator service prior to excavation, and the owner of underground utilities is not required to mark its facilities for that excavator.

*Liability exemption for excavator compliance.*

An excavator is exempt from liability under RCW 19.122, if it complies with the statute, but, nonetheless, damages underground facilities. RCW 19.122.045.

**Entities not regulated by the UTC.**

I considered the potential argument that RCW 19.122 does not apply to excavators or property owners if those entities are not regulated by the Washington Utilities and Transportation Commission (UTC). However, if that argument was valid, that would mean the statute has extremely limited scope, because it would not apply to the hundreds (or perhaps thousands) of back-hoe operators and similar businesses around the state over whom the UTC has no jurisdiction. There is no such broad-based exemption in the words of the statute, and I see no basis for implying one.

I am aware that cities and towns are generally exempt from UTC regulation under Title 80 RCW (RCW 80.04.500),<sup>8</sup> and municipal corporations are not included as entities subject to UTC jurisdiction under that same title. *Monroe Water Co. v. Town of Monroe*, 135 Wash. 355, 360, 237 P. 996 (1925). Moreover, under RCW 54.16.040, a PUD's ownership, operation and control of electric facilities (among other things) are "free from the jurisdiction and control" of the UTC.

However, these statutes do not apply because the UTC has no regulatory role under RCW 19.122 other than to establish standards for the one-call locator service, and even then, only in consultation with the Washington Utilities Coordinating Council. RCW 19.122.027(2). The UTC does not operate the one-call locator service; by law, that service "shall be operated by non-governmental entities." RCW 19.122.027(3).

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<sup>8</sup> This does not apply to the UTC's ability to regulate the safety of city-owned gas distribution facilities, which, since 2007, has been undertaken pursuant to Title 81 RCW. Even previously, RCW 80.04.510 did not exempt cities and towns from UTC gas safety regulation.

Moreover, the Legislature has not charged the UTC with enforcement of RCW 19.122, such as when an excavator fails to use the one-call locator service as required by RCW 19.122.030(1) and .033(1), or when the owner of underground property fails to locate the facilities as required by RCW 19.122.030(2) and .033(1). Instead, enforcement of RCW 19.122 is by private action, or, for example, by a county through the county prosecutor's office, or the state, through the office of the attorney general. In the latter case, the action would be brought in the name of the state, not the UTC. In no case does the UTC directly enforce RCW 19.122.<sup>9</sup>

In short, RCW 19.122 is not a UTC regulatory statute. It is a general statute that may be enforced by state and local law enforcement agencies, the same as any other general statute. Therefore, an entity must comply with RCW 19.122 whether or not it is regulated by the UTC under Title 80 or 81.

I trust the foregoing is responsive to your question. If you need any further assistance, please contact me.

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<sup>9</sup> Because the UTC has no enforcement jurisdiction under RCW 19.122, the UTC has adopted rules requiring entities the UTC regulates to follow the requirements of RCW 19.122 (e.g., WAC 480-93-250 (gas companies) and WAC 480-75-270 (hazardous liquid pipeline companies)). Thus, if one of these UTC-regulated companies violates RCW 19.122, the UTC can initiate an enforcement action based on a violation of these UTC rules, rather than a direct violation of the statute.