

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NOTICE OF PENALTIES INCURRED AND DUE
FOR VIOLATIONS OF LAWS AND RULES

PENALTY ASSESSMENT: D-200173
PENALTY AMOUNT: \$6,000
Investigation # 8159

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The Washington Utilities and Transportation Commission (Commission) believes that Modern Homes LLC (Modern Homes or Company) has violated Revised Code of Washington (RCW) 19.122 by failing to provide the required notification to utility operators prior to excavating. RCW 19.122.070(1) states, in part, that violations of any provision of the chapter are subject to a civil penalty of not more than \$1,000 for an initial violation and not more than \$5,000 for each subsequent violation within a three-year period.

The Commission reviewed findings and recommendations made by the Washington State Dig Law Safety Committee (Safety Committee) and hereby notifies you that it is assessing a \$6,000 penalty against Modern Homes on the following grounds:

On February 18, 2020, the Safety Committee heard the complaints for cases 19-056 and 19-057 against Modern Homes regarding alleged violations of the Washington state dig law, RCW 19.122 that occurred on April 30, 2019, and May 2, 2019, at 8360 19th Ave. NW, Seattle Washington. The complainant in this case was Puget Sound Energy (PSE). The Safety Committee determined that the Company committed the following violations:

- One violation of RCW 19.122.030(2) for failing to submit a utility locate request not less than two business days before beginning excavation on April 30, 2019; and
- One violation of RCW 19.122.030(2) for failing to submit a utility locate request not less than two business days before beginning excavation on May 2, 2019.

The Safety Committee recommends that the Commission assess the following \$6,000 penalty against Modern Homes:

- \$1,000 penalty for the violation of RCW 19.122 that occurred on April 30, 2019; and

- \$5,000 penalty for the violation of RCW 19.122 that occurred on May 2, 2019.

The Safety Committee further recommends the Commission offer to suspend a \$5,000 portion of the penalty amount if the owner and field staff of Modern Homes complete National Utility Contractor Association (NUCA) Dig Safe Training within 12 months of the date of this Notice, and the Company incurs no additional dig law violations within 12 months of the date of this Notice.

Commission regulatory staff (Staff) reviewed the Safety Committee's determination and agrees with its conclusions. Staff determined that Modern Homes violated RCW 19.122 on two occasions. Staff based this decision on the following information provided by the Safety Committee:

First Violation

On April 30, 2019, a PSE damage prevention representative observed Modern Homes excavating at 8360 19th Ave. NW, Seattle, Washington. The representative could not find a valid dig ticket in the 811 utility locate request database, made contact with the excavation crew, and requested digging stop until the Company had a valid dig ticket. The representative informed the employees and Company owner of the safety concerns and possible penalties for violations of the law. Photos provided by PSE demonstrate that excavation of a building foundation was occurring on April 30, 2019. Following the visit from PSE, the Company requested utility locate request #19171871 for the jobsite.

Staff was present during the Safety Committee's review to hear the arguments made during the review, and subsequently reviewed the evidence provided to the Committee by PSE as well as the Company's utility locate request history. The investigation determined that the Company did not submit a utility locate request prior to the excavation it performed, which violates RCW 19.122.030(1)(a). Staff believes this subsection is a more accurate citation than the violation cited by the Safety Committee because the Company had not yet submitted a utility locate request at the time of the violation.

Second Violation

On May 2, 2019, a PSE contract locator arrived at 8360 19th Ave. NW, Seattle to mark a PSE underground utility as requested by utility locate request #19171871, which was submitted by Modern Homes. The locate request, made on April 30, 2019, was not valid until May 3, 2019, which is two full business days after the request. The locator notified PSE damage prevention staff that the Company was actively excavating prior to the valid start date assigned to the locate request. PSE damage prevention field staff returned to the site and observed active excavation by Company employees. The PSE representative again expressed his concern to Company employees about the dangers to themselves and the public of excavating without a valid dig ticket, and Company employees continued to excavate. The PSE representative photographed a track hoe excavating the foundation on the property.

Staff's review of the arguments made during the review and the photos submitted to the Safety Committee by PSE concluded that Modern Homes violated RCW 19.122.030(2) by not submitting a utility locate request at least two full business days before beginning excavation.

Staff recommends the Commission accept the Safety Committee's recommendation and assess a \$6,000 penalty against the Company for two violations of RCW 19.122 for failing to provide the required notice to a one-number locator service not less than two business days before excavating, as follows:

- \$1,000 penalty for the violation of RCW 19.122.030(1)(a) that occurred on April 30, 2019; and
- \$5,000 penalty for the second violation of RCW 19.122.030(2) that occurred on May 2, 2019.

Staff's research indicates that the Company appears to be familiar with the requirements of the dig law, as evidenced by previously submitted utility locate requests, but that it may not fully appreciate the danger to employees and the public that excavating without providing proper notice to facility operators before excavating poses. After considering all of the circumstances, Staff concurs with the Safety Committee's recommendation that the Commission should offer to suspend \$5,000 of the total penalty amount for a period of one year subject to the following conditions: (1) Field management of Modern Homes must attend Dig Safe training provided through NUCA within 12 months of the date of this Notice; and (2) the Company incurs no further violations of RCW 19.122 within 12 months of the date of this Notice.

The Commission agrees with Staff's recommendation and assesses a penalty of \$6,000 with an offer to suspend \$5,000 of the total penalty amount subject to the conditions listed above. The Commission will waive the \$5,000 suspended penalty if the Company complies with both conditions. If the Company fails to comply with either of these conditions, the \$5,000 suspended penalty amount will become immediately due and payable in addition to any new penalties that the Commission may assess for additional violations.

These facts, if not contested or if proved at a hearing and not rebutted or explained, are sufficient to support the penalty assessment.

Your penalty is due and payable now. If you believe that any or all of the violations did not occur, you may deny committing the violation(s) and contest the penalty through evidence presented at a hearing or in writing. Alternatively, if there is a reason for any or all of the violations that you believe should excuse you from the penalty, you may ask for mitigation (reduction) of the penalty through evidence presented at a hearing or in writing. The Commission will grant a request for hearing only if material issues of law or fact require consideration of evidence and resolution in a hearing. Any request to contest the violations or for mitigation of the penalty must include a written statement of the reasons supporting that request. Failure to provide such a statement will result in denial of the request. *See* RCW 81.04.405.

If you properly present your request for a hearing and the Commission grants that request, the Commission will review the evidence supporting your dispute of the violations or application for mitigation in a Brief Adjudicative Proceeding before an administrative law judge. The administrative law judge will consider the evidence and will notify you of their decision.

You must act within 15 days after receiving this notice to do one of the following:

- Pay the \$6,000 amount due;
- Pay \$1,000 of the total penalty amount and notify the Commission that you accept the offer to suspend, and ultimately waive, the remaining \$5,000 of the penalty amount subject to the following conditions:
 - Modern Homes representatives attend Dig Safe training provided through NUCA within twelve (12) months of this Notice; and
 - **Submit documentation of that attendance to the Commission within five (5) days of attending the training; and**
 - Modern Homes incurs no additional violations of RCW 19.122 within twelve (12) months of the date of this Notice; or
- Request a hearing to contest the violation(s); or
- Request mitigation to reduce the amount of the penalty.

Please indicate your selection on the enclosed form and send it to the Washington Utilities and Transportation Commission, Post Office Box 47250, Olympia, Washington 98504-7250, **within FIFTEEN (15) days** after you receive this notice.

If you do not act within 15 days, the Commission may refer this matter to the Office of the Attorney General for collection. The Commission may then sue you to collect the penalty.

DATED at Lacey, Washington, and effective July 28, 2020.

/s/ Rayne Pearson
RAYNE PEARSON
Director, Administrative Law Division

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PENALTY ASSESSMENT D-200173, Investigation # 8159

PLEASE NOTE: You must complete and sign this document, and send it to the Commission within 15 days after you receive the penalty assessment. Use additional paper if needed.

I have read and understand RCW 9A.72.020 (printed below), which states that making false statements under oath is a class B felony. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters. I hereby make, under oath, the following statements.

1. **Payment of penalty.** I admit that the violations occurred and enclose \$6,000 in payment of the penalty.
2. **Accept conditions.** I admit that the violations occurred and enclose \$1,000 toward the payment of the penalty. I also accept the Commission’s offer to suspend, and ultimately waive, the remaining \$5,000 of the penalty amount subject to the following conditions:
- Modern Homes owner and field supervisors attend Dig Safe training provided through NUCA within twelve (12) months of the date of this Notice; and
 - Submit documentation of that attendance to the Commission within five (5) days of attending the training;** and
 - Modern Homes incurs no additional violations of RCW 19.122 within twelve (12) months of the date of this Notice.
3. **Contest the violation.** I believe that the alleged violation(s) did not occur for the reasons I describe below:
- a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision.
- OR b) I ask for a Commission decision based solely on the information I provide above.
4. **Request mitigation.** I admit the violations, but I believe that the penalty should be reduced for the reasons set out below:

- a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision.
- OR b) I ask for a Commission decision based solely on the information I provide above.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing, including information I have presented on any attachments, is true and correct.

Dated: _____ [Month/Day/Year], at _____ [City, State]

Name of Respondent (Company) – please print

Signature of Applicant

RCW 9A.72.020:

“Perjury in the first degree. (1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law. (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor’s mistaken belief that his statement was not material is not a defense to a prosecution under this section. (3) Perjury in the first degree is a class B felony.”