

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

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<b>PUBLIC SERVICE COMMISSION,</b>	)	<b>Case No. PU-20-340</b>
	)	
<b>Complainant,</b>	)	<b>NOTICE OF MOTION FOR</b>
<b>vs.</b>	)	<b>ORDER OF DEFAULT</b>
	)	
<b>Dean's Excavating, LLC.,</b>	)	
	)	
<b>Respondent.</b>	)	

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**TO: Dean's Excavating, LLC.,** 207 121<sup>st</sup> Ave SW, Minot, ND 58701-9774.

**PLEASE TAKE NOTICE** that the Public Service Commission, Advocacy Staff, Movant in the above proceeding, respectfully moves for an order declaring Dean's Excavating, LLC. in default. The motion is attached to this notice and by reference made a part hereof.

**YOUR ARE HEREWITH NOTIFIED** that the Notice of Motion and Motion for Judgment of Default has been submitted pursuant to N.D.C.C. § 28-32-21(e) and N.D. Admin. Code art. 69-02. The Public Service Commission may deem the Formal Complaint admitted and may enter an order in default as the facts and law may warrant. If the Public Service Commission rules in favor of Advocacy Staff's motion, you have (7) days after service of the default notice, order and grounds to file a written motion with the Public Service Commission requesting that the default order be vacated and stating the grounds relied upon.

Bismarck, North Dakota, this 15<sup>th</sup> day of September, 2021.



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Brian Johnson  
Special Assistant Attorney General Bar ID 07397  
North Dakota Public Service Commission  
600 East Boulevard Avenue Dept. 408  
Bismarck ND, 58505  
701-328-2407

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

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PUBLIC SERVICE COMMISSION,	)	Case No. PU-20-340
	)	
Complainant,	)	
	)	MOTION FOR
vs.	)	ORDER OF DEFAULT
	)	AND MEMORANDUM OF
Dean’s Excavating, LLC.,	)	LAW
	)	
Respondent.	)	

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**MOTION FOR ORDER OF DEFAULT**

Public Service Commission Advocacy Staff (“Advocacy Staff”) respectfully seeks an order in default against Respondent, Dean’s Excavating, LLC. In support of the motion, Advocacy Staff states the following:

**MEMORANDUM**

Pursuant to N.D.C.C. § 28-32-21(e) and N.D. Admin. Code § 69-02-02-03(1), a Formal Complaint “may inform the respondent that an answer to the complaint must be served upon the complainant and the agency with which the complaint is filed within twenty days after service of the complaint, or the agency may deem the complaint to be admitted.” On August 19, 2021, Dean’s Excavating, LLC. received the Formal Complaint filed with the Commission via certified mail. Dean’s Excavating, LLC. failed to respond to the Formal Complaint within the time allotted under N.D.C.C. § 28-32-21(e). Having failed to answer the complaint, the Commission may deem the Formal Complaint to be admitted by ` and “enter an order in default as the facts and law may warrant.” N.D.C.C. § 28-32-21(e).

## BACKGROUND

On July 10, 2020, the Commission received a ND One-Call Complaint from Tina Beach with Cenex Pipeline, LLC (Cenex). The complaint alleges a violation by Dean's Excavating, LLC (Dean's) of North Dakota Century Code section 49-23-04(1) of the One-Call Excavation Notice System by failing to provide an excavation or location notice before beginning any excavation. *See Attached ND One-Call Complaint.* On July 10, 2020, Commission staff issued a letter informing Dean's of Cenex's complaint filing and requested a response by July 24, 2020. As of September 15, 2021, Dean's has not responded. On June 23, 2021 the Commission appointed Advocacy Staff to the case effective June 16, 2021.

On June 16, 2021, based on its investigation, Advocacy Staff filed a Formal Complaint alleging Dean's violated N.D.C.C. § 49-23-04(1) by failing to provide an excavation or location notice before beginning any excavation. *See Attached Formal Complaint.* On July 14, 2021, the Commission found the Formal Complaint stated a *prima facie* case. Service of the Formal Complaint was initiated on August 17, 2021 via certified mail by Geralyn R. Schmaltz to Ardelle Biewer, Registered Agent for Dean's Excavating, LLC, 201 121<sup>st</sup> Ave SW, Minot, ND 58701 (Cert. No. 7020 1810 0000 0893 9622). A return receipt was signed by MSRR3C19 on August 19, 2021. *See Attached Return Ticket.*

In Section IX of the Formal Complaint, Dean's was informed that "[t]he respondent must serve an answer to this complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted." Having received no answer to the Formal Complaint by September 9, 2021, the Commission may deem the Formal Complaint to be admitted and enter an Order of Default pursuant to N.D.C.C. §

28-32-21(e). As of September 15, 2021, Dean's has not responded and has not responded to any attempt by Advocacy Staff to communicate.

**CONCLUSION**

For these reasons, Advocacy Staff respectfully requests the Public Service Commission enter an Order of Default against Dean's, impose an appropriate civil penalty up to \$25,000, but at least \$500, and such other relief that the Commission finds just and proper.

Dated: September 15, 2021

Respectfully,



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Brian Johnson  
Special Assistant Attorney General Bar ID 07397  
North Dakota Public Service Commission  
600 East Boulevard Avenue Dept. 408  
Bismarck ND, 58505  
701-328-2407



# ND ONE-CALL COMPLAINT

Public Service Commission

SFN 59067 (5-17)

To allege a violation of the One-Call Excavation Notice System Law: North Dakota Century Code Chapter 49-23

## PART A – WHO IS SUBMITTING THIS COMPLAINT (COMPLAINANT)

Company/Person Cenex Pipeline	Street Address 803 Hwy 212 S	City Laurel	State and Zip Code MT
Telephone and Cell Phone Number 406-628-5443	Email Address tina.beach@chsinc.com	Date 07/10/2020	
<input checked="" type="checkbox"/> Complainant is willing and able to testify on the complaint if matter goes to formal hearing			

## PART B – WHO VIOLATED THE ONE-CALL REGULATIONS (RESPONDENT)

Company/Person Dean Geiger/Dean's Excavating	Street Address 207 121st Ave SW	City Minot	State and Zip Code ND 58701
Telephone and Cell Phone Number 701-240-5923	Email Address deangeiger@hotmail.com		

## PART C – ALLEGED VIOLATION

<input type="checkbox"/> Operator failed to provide or update the information provided to the notification center on a timely basis <input checked="" type="checkbox"/> Excavator failed to provide excavation or location notice at least 48 hours before beginning any excavation <input type="checkbox"/> Excavator failed to provide required information in excavation or location notice <input type="checkbox"/> Notification center failed to transmit the notice to every operator that has an underground facility in the area of the excavation <input type="checkbox"/> Notification center failed to inform the excavator of the names of operators of underground facilities in the area <input type="checkbox"/> Operator failed to locate and mark underground facility within 48 hours <input type="checkbox"/> Excavation started prior to underground facility locate <input type="checkbox"/> Operator failed to mark underground facility within 24 inches horizontally <input type="checkbox"/> Excavator failed to renew excavation or location request prior to the expiration of the twenty-one-day period <input type="checkbox"/> Excavator failed to conduct the excavation in a careful and prudent manner to avoid damage of underground facilities <input type="checkbox"/> Excavator failed to maintain the markings during excavation <input type="checkbox"/> Other (identify the specific section of NDCC Chapter 49-23) _____
--

Location of Violation:  
In Logan, 48.145347 & -101.157041

Date and Time of Violation:  
On 06/08 during aerial inspection between 11:41am and 4:39pm.

Description (summarize the observations on which you rely to allege the violation) *If more space is required, please provide the description on a separate page.*

On June 8th during Cenex Pipeline Aerial Inspection pilot Allen Rickman observed a foundation for a building being built about 100 feet from the Cenex Pipeline. Field staff was dispatched and they confirmed that Dean's Excavating was digging a foundation for a new home. Dean Geiger stated he thought the Homeowner and contractor had made the call and so he didn't make one. Our field staff reports there was no flags in the area. He did flag our line as you can see of the pictures. Nathan our field staff also advised he did talk with Dean's Excavating and they advised they were aware of the one call law but again thought the landowner had called a locate in. On 07/09/2020 I personally called Mr. Geiger as during additional aerial inspections it appeared the foundation had been poured and completed and we never did get a one call at this location. When speaking with Mr. Geiger he said there were flags present when he arrived on site so he assumed the landowner had called. Contractor and owner Whilmeyer stated he thought that Dean's excavating had called. I advised Dean's excavating he would be legally responsibility & he should ensure he has a valid locate to dig anytime.

## PART D – DAMAGE

Fatalities None	Injuries None	In-patient Hospitalization None
Underground facility type(s) and Operator(s) affected: Although no direct damage was done, Cenex Pipeline is concerned that Dean's Excavating a professional excavating service in ND, would ever do a project without having a valid locate ticket. This could have been an environmental catastrophe as well as injured Mr. Geiger and the landowner.		
Estimated Value of Damage (damage as defined under NDCC Chapter 49-23): \$	Number of Customers Affected N/A	
Other impact of event: This was a near miss but neither the excavator nor the property owner placed a one call.		
Please attach photos of Event Area or Damaged Facility		

## PART I – SIGNATURE

Signature of Person Filing Complaint 	Date 7/10/2020
--	-------------------

**Submit**

If the "Submit" function is not working properly, please print the completed form and then either email to ndpsc@nd.gov, fax to 701-328-2410 or send to Public Service Commission, 600 E Boulevard Ave Dept 408, Bismarck ND 58505-0480.

Telephone: (701) 328-2400

## -Info-Public Service Commission

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**From:** Beach, Tina <Tina.Beach@chsinc.com>  
**Sent:** Friday, July 10, 2020 10:06 AM  
**To:** -Info-Public Service Commission  
**Cc:** Washek, Nathan  
**Subject:** Near Miss by a professional excavator-failed to make a locate request.  
**Attachments:** CCE07102020.pdf; aerial inspection photo1.png; Theodolite\_2020.06.10\_12.50.58\_000228photo1.JPG; Theodolite\_2020.06.10\_12.52.17\_000229photo2.JPG

**CAUTION:** This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Dear PSC;

I spoke with Dean Geiger yesterday he clearly does understand the fact he should have made a one call. However, the fact that there were no flags present upon our arrival and Mr. Geiger claims there were flags all over the place and he assumed the landowner had made the call. Ultimately as a professional excavator it is his responsibility to ensure he has a active locate to be working. This was a near miss and could have resulted in an environmental disaster, possible death or injury to himself or the landowner, had he been 100 feet closer to our pipeline. In my discussions with Dean I am not certain he realizes how fortunate he was not to have struck our pipeline or any other utilities in the area. To this day this homeowner/contractor and or Dean's excavating have not submitted a locate for the home they are building in this location. Note the extensive dirt work and how close they are to Cenex Pipeline as noted by the yellow flags. If you have further questions feel free to give me a call.

Tina R. Beach  
Public Awareness Specialist



[tina.beach@chsinc.com](mailto:tina.beach@chsinc.com)

Direct: 406-628-5443

Mobile: 206-445-4121

803 Highway 212 S, Laurel, MT 59044

Visit us at [chsinc.com](http://chsinc.com)

Farmer-owned with  
global connections

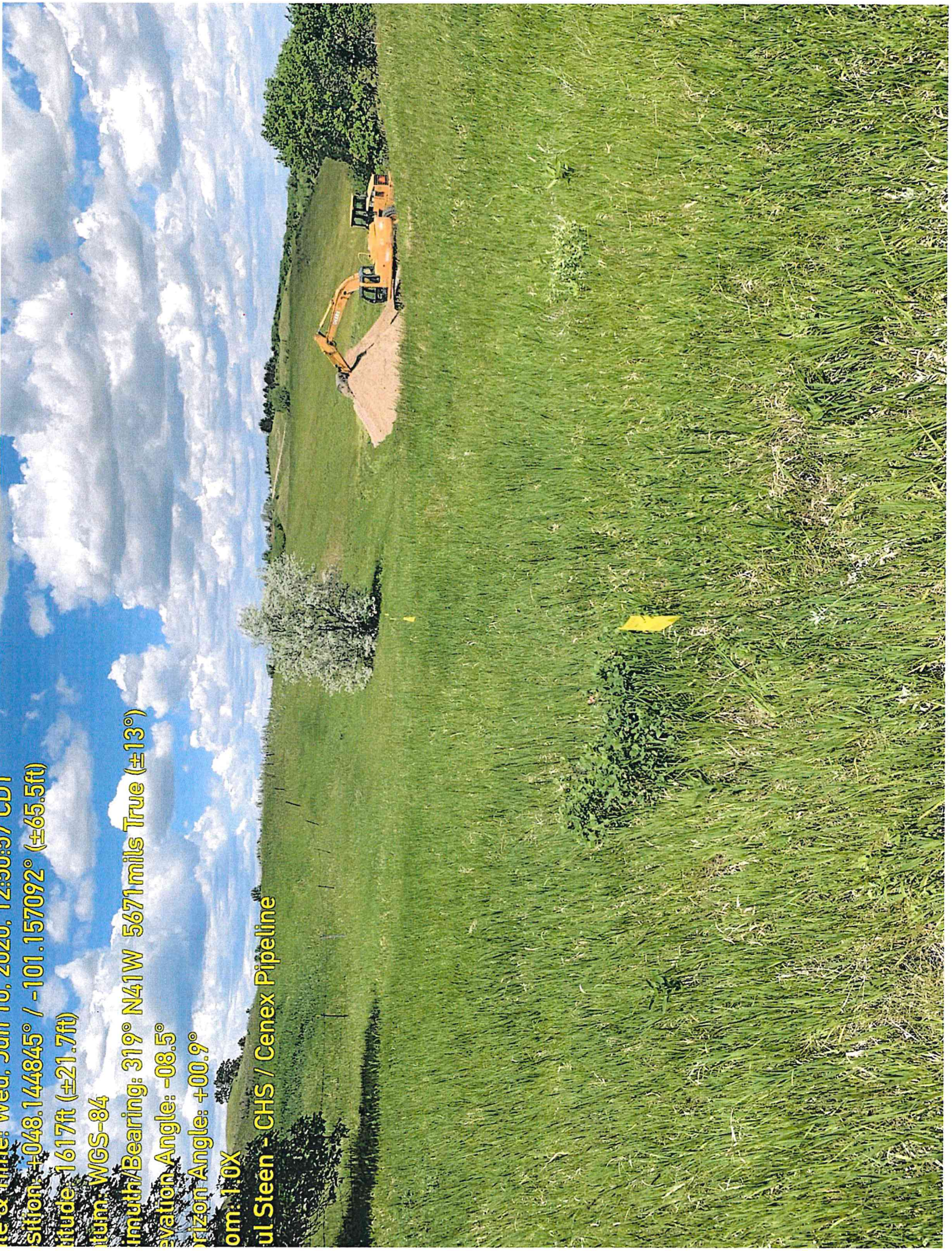
**Know what's below.**  
**Call  before you dig.**

Please be advised this entire email (including all attachments, forwards, and replies) is for the sole use of the intended recipient(s) and may contain proprietary, confidential and/or privileged material. If you are not the intended recipient(s) of this e-mail, you are hereby notified any use, review, retransmission, dissemination, disclosure, distribution, copying, or any other action taken with respect to this communication is strictly prohibited, and may be a violation of law. If you have received this communication in error, please delete the e-mail and all attachments from all computer devices, destroy all paper copies, and notify the sender by reply email. Thank you.

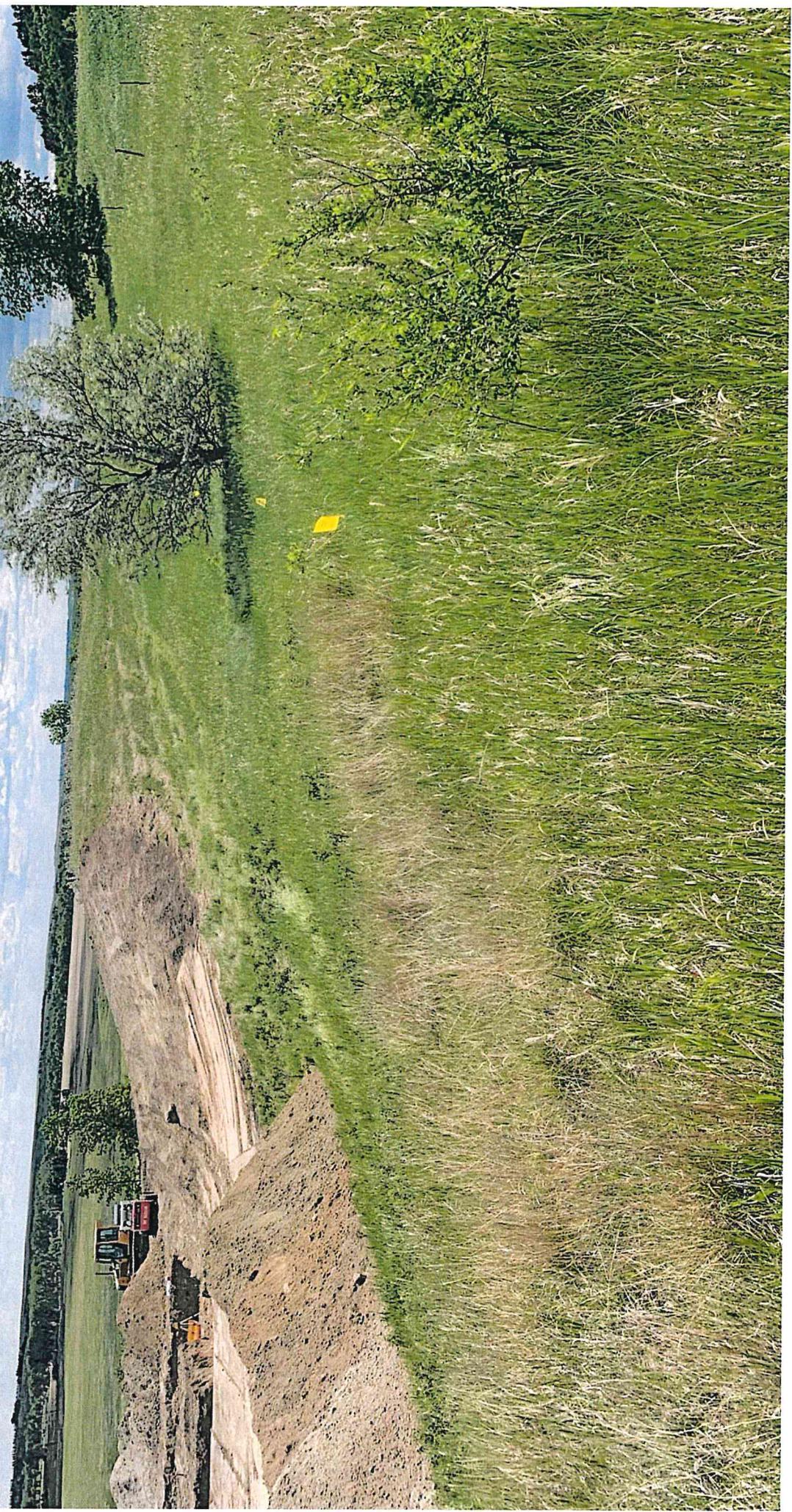




Site & Time: Wed, Jun 10, 2020, 12:50:37 CDT  
Position: +048.144845° / -101.157092° (±65.5ft)  
Altitude: 1617ft (±21.7ft)  
Datum: WGS-84  
Azimuth/Bearing: 319° N41W 5671mils True (±13°)  
Elevation Angle: -08.5°  
Horizon Angle: +00.9°  
Zoom: 1.0X  
Full Screen - CHS / Cenex Pipeline



Date & Time: Wed, Jun 10, 2020, 12:52:17 CDT  
Position: +048.145371° / -101.157752° (±16.0ft)  
Altitude: 1616ft (±10.5ft)  
Datum: WGS-84  
Azimuth/Bearing: 127° S53E 2258mils True (±13°)  
Elevation Angle: -06.1°  
Horizon Angle: +04.0°  
Zoom: 1.0X  
Full Screen - CHS / Cenex Pipeline





# Public Service Commission State of North Dakota

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## COMMISSIONERS

Julie Fedorchak  
Randy Christmann  
Brian Kroshus

600 East Boulevard Avenue Dept. 408  
Bismarck, ND 58505-0480  
Web: [www.psc.nd.gov](http://www.psc.nd.gov)  
Phone: 701-328-2400  
ND Toll Free: 1-877-245-6685  
Fax: 701-328-2410  
TDD: 800-366-6888 or 711

June 16, 2021

Mr. Steve Kahl  
Executive Secretary  
ND Public Service Commission  
600 E Boulevard Avenue Dept. 408  
Bismarck, ND 58505-0480

*via Hand Delivery*

Re: Case No. PU-20-340  
Public Service Commission  
Dean's Excavating  
Damage Prevention Enforcement

Dear Mr. Kahl:

Enclosed is a copy of the Complaint to be filed in the above captioned case.

Best Regards,

A handwritten signature in black ink, appearing to be "BJ", written over a horizontal line.

Brian Johnson  
Legal Counsel

Enclosure

3 **PU-20-340** Filed: 6/16/2021 Pages: 6  
**Complaint**

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission  
Dean’s Excavating, LLC.  
Damage Prevention Enforcement

Case No. PU-20-340

Public Service Commission, )  
Complainant, )  
vs. )  
Dean’s Excavating, LLC., )  
Respondent. )

Complaint

The Public Service Commission of North Dakota (Commission), by and through Advocacy Staff (Staff), for its complaint against Dean’s Excavating, LLC., alleges and shows the following:

I

Dean’s Excavating, LLC. (Dean’s) is a North Dakota Corporation with offices located at 207 121<sup>st</sup> Ave SW, Minot, ND 58701, and a registered agent address of Ardelle Biewer, 201 121<sup>st</sup> Ave SW, Minot, ND 58701.

II

Cenex Pipeline, LLC. (Cenex) is a foreign corporation authorized to do business in North Dakota.

III

North Dakota Century Code (N.D.C.C.) 49-23-04(1) provides:

Except in an emergency, an excavator shall contact the notification center and provide an excavation or location notice before beginning any

excavation. An excavation begins the first time excavation occurs in an area that was not previously identified by the excavator in an excavation notice.

North Dakota Century Code (N.D.C.C.) 28-32-22 provides:

Unless otherwise prohibited by specific statute or rule, informal disposition may be made of any adjudicative proceeding, or any part or issue thereof, by stipulation, settlement, waiver of hearing, consent order, default, alternative dispute resolution, or other informal disposition, subject to agency approval. Any administrative agency may adopt rules of practice or procedure for informal disposition if such rules do not substantially prejudice the rights of any party. Such rules may establish procedures for converting an administrative matter from one type of proceeding to another type of proceeding.

North Dakota Century Code (N.D.C.C.) 49-07-01.1 provides:

Any person who violates any statute, commission order, or commission rule which applies to matters within the authority of the commission under chapters 8-08, 8-09, 8-10, 24-09, 32-25, and 51-05.1, titles 60 and 64, and title 49 except for chapters 49-22 and 49-23, shall, in addition to any other penalty provided, be subject to a civil penalty of not to exceed five thousand dollars. A violation occurring under chapter 49-23, in addition to any other penalty, is subject to a civil penalty not to exceed twenty-five thousand dollars. The commission shall develop policies for the assessment of penalties under chapter 49-23 which will take into consideration the severity of damages and the conduct of the offender. The civil penalty may be compromised by the commission. The amount of the penalty when finally determined or agreed upon in compromise, if not paid, may be recovered in a civil action in the courts of this state.

North Dakota Administrative Code section 69-02-04-05 provides:

In any proceeding in which the commission is authorized to act after opportunity for hearing, opportunity is afforded by service of notice fixing a reasonable period of time within which any person desiring to be heard may file a protest or request for a hearing. If a protest or request for hearing is not filed within the time provided, the commission may dispose of the matter on the basis of the pleadings, other submittals, and the studies and recommendations of the staff. A party not requesting oral hearing in the party's pleading is deemed to have waived a hearing for the purpose of the decision, but not for the purpose of applying for rehearing with respect to the decision. If a person requests a hearing but does not show good cause, the commission may determine the matter without a hearing.

#### IV

On July 10, 2020, the Commission received a ND One-Call Complaint from Tina Beach at Cenex. The complaint alleges a violation by Dean's of N.D.C.C. 49-23-04(1) of the One-Call Excavation Notice System by failing to provide an excavation or location notice before beginning any excavation.

#### V

On July 10, 2020, Commission staff issued a letter informing Dean's of Cenex's complaint filing, and requested a response by July 24, 2020, attached as Exhibit 1. As of June 16, 2021, Dean's has not responded to the letter or a subsequent email sent to Dean's on June 4, 2021.

#### VI

As alleged by Cenex's complaint, on June 8, 2020, Dean's began an excavation as defined in NCCC section 49-23-01(7) while performing excavation for a building foundation at latitude 48.145347, longitude -101.157041. There is no evidence of Dean's contacting the North Dakota One Call Notification Center prior to beginning this excavation. No damage resulted from this excavation.

#### VII

Dean's violated N.D.C.C. 49-23-04(1) by failing to provide an excavation or location notice before beginning any excavation.

## VIII

The Commission Damage Prevention Plan provides:

### **D PROPOSED CIVIL PENALTIES:**

1. The following criteria must be used by Commission staff to determine if a civil penalty should be proposed when filing a formal complaint:
  - a. The nature, circumstances and severity of the complaint;
  - b. The degree of suspected fault on the part of the respondent;
  - c. The respondent's history of prior violations or complaints;
  - d. The respondent's ability to pay;
  - e. Any good faith effort by the respondent in attempting to achieve compliance; and
  - f. The effect the penalty may have on the respondent's ability to continue in business.

## IX

The Respondent must serve an answer to this complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.

### **Prayer for Relief**

Based on the foregoing, Staff seeks the following relief:

1. That the Commission find Dean's Excavating, LLC. in violation of N.D.C.C. chapter 49-23 for failing to comply with the One Call requirements enumerated in North Dakota Century Code section 49-23-04(1).
2. That the Commission impose an appropriate civil penalty up to \$25,000, but at least \$500.
3. Such other relief that the Commission finds just and proper.

Dated this 16th day of June, 2021.



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Brian Johnson  
Special Assistant Attorney General Bar ID 07937  
North Dakota Public Service Commission  
600 East Boulevard Avenue Dept. 408  
Bismarck ND, 58505  
701-328-2407

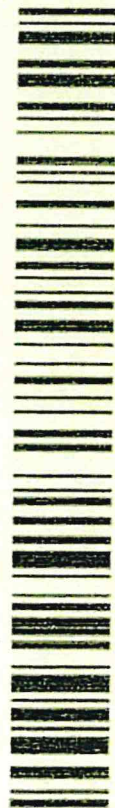
PU-20-340

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Ardelle Biewer  
 Registered Agent for Dean's Excavating, LLC  
 201 121st Ave SW  
 Minot, ND 58701  
 Cert. No. 7020 1810 0000 0893 9622  
 Case No. PU-20-340



9590 9402 6611 1028 1238 70

2. AI

7020 1810 0000 0893 9622

PS Form 3811, July 2020 PSN 7530-02-000-9053

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 X MS RBC19  Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

Service Type

- Adult Signature
- Adult Signature Restricted Delivery
- Certified Mail®
- Certified Mail Restricted Delivery
- Collect on Delivery
- Collect on Delivery Restricted Delivery
- Insured Mail
- Insured Mail Restricted Delivery (over \$500)
- Priority Mail Express®
- Registered Mail™
- Registered Mail Restricted Delivery
- Signature Confirmation™
- Signature Confirmation Restricted Delivery

Domestic Return Receipt

