

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND AND TWELVE

H.P. 1329 - L.D. 1803

An Act To Implement the Recommendations of the Dig Safe Work Group

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the underground facility damage prevention system, established pursuant to the so-called dig safe law, ensures the health and safety of the citizens of the State when excavations are to occur; and

Whereas, this Act affects the system; and

Whereas, it is important to implement the changes to the system immediately to keep the people involved with the system safe; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 23 MRSA §3360-A, sub-§1, ¶D, as enacted by PL 1979, c. 362, §2, is amended to read:

D. "Person" means an individual, partnership, municipality, state, including an agency or department of the state, county, political subdivision, utility, joint venture or corporation and includes the employer of an individual.

Sec. 2. 23 MRSA §3360-A, sub-§1, ¶E, as enacted by PL 1979, c. 362, §2, is amended to read:

E. "Underground facility" means any item of personal property buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, electric energy, oil, gas or other substances and including, but not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, appurtenances and those parts of poles below ground. This definition ~~shall~~ does not include liquefied propane gas

distribution systems that are not included within the scope of 49 Code of Federal Regulations, Part 192 and highway drainage culverts or under drains.

Sec. 3. 23 MRSA §3360-A, sub-§3, ¶F, as enacted by PL 2001, c. 577, §5, is amended to read:

F. In the case of an excavation involving subcontractors or other arrangements in which more than one entity qualifies as the excavator under this section, the excavator directly responsible for performing the excavation shall ascertain that all notifications required by this subsection and subsections 5, 5-A and ~~40~~ 10-A are performed.

Sec. 4. 23 MRSA §3360-A, sub-§3, ¶G, as enacted by PL 2003, c. 373, §2, is amended to read:

G. If an excavator notifies the system and nonmember operators as required by this section and is informed by the system and each nonmember operator, including private landowners, that no underground facilities exist in the proposed excavation area, ~~then~~ the excavator is not required to wait the 3 days as required by this subsection and subsection ~~40~~ 10-A and may begin excavation immediately.

Sec. 5. 23 MRSA §3360-A, sub-§5-D, as enacted by PL 2001, c. 577, §8, is amended to read:

5-D. Exemption; cemeteries. An excavator is exempt from the notice requirements of subsection 3 and subsection ~~40~~ 10-A for any excavation undertaken within the boundaries of a cemetery if the following procedures are followed.

A. The person responsible for operating the cemetery shall provide notice pursuant to subsections 3 and ~~40~~ 10-A identifying the entire cemetery as a potential excavation site. Owners and operators of underground facilities within the cemetery shall mark those facilities in accordance with subsections 4 and ~~40~~ 10-A, as applicable. Thereafter, the person responsible for operating the cemetery shall maintain sufficient records or markings to identify the location of underground facilities within the cemetery.

B. The person responsible for operating the cemetery shall identify the location of any underground facilities within the excavation area and take appropriate action to avoid damage to the facilities.

Sec. 6. 23 MRSA §3360-A, sub-§5-E, ¶A, as enacted by PL 2001, c. 577, §8, is amended to read:

A. The excavator shall provide notice as required by subsections 3 and ~~40~~ 10-A and the owner or operator of underground facilities shall respond as required by subsections 4 and ~~40~~ 10-A.

Sec. 7. 23 MRSA §3360-A, sub-§5-I, ¶¶B and C, as enacted by PL 2011, c. 72, §4, are amended to read:

B. Except as provided in paragraph C, an excavator is exempt from the notice requirements of subsection 3 and subsection ~~40~~ 10-A when undertaking an excavation within a quarry or borrow pit lawfully located on March 1, 2011.

C. An excavator undertaking an excavation within a quarry or borrow pit lawfully located after March 1, 2011 or lawfully expanded after March 1, 2011 is governed by the following.

(1) The owner or operator of the quarry or borrow pit shall provide notice pursuant to subsections 3 and ~~40~~ 10-A identifying the entire area potentially subject to excavation.

(2) Owners and operators of underground facilities in the area identified pursuant to subparagraph (1) shall mark those facilities in accordance with subsections 4 and ~~40~~ 10-A, as applicable. Thereafter, the owner or operator of the quarry or borrow pit shall maintain sufficient records or markings to identify the location of underground facilities within the area identified pursuant to subparagraph (1) and an excavator undertaking an excavation in that area is exempt from any further notice requirements under subsection 3 and subsection ~~40~~ 10-A.

(3) The owner or operator of the quarry or borrow pit shall take appropriate action to avoid damage to the underground facilities identified pursuant to subparagraph (2).

Sec. 8. 23 MRSA §3360-A, sub-§5-K is enacted to read:

5-K. Exemption; unpaved private road grading. A person is exempt from the requirements of this section for any grading activities undertaken on private roads that meet the following criteria:

A. The grading activities are limited to the shaping, maintaining or scraping of a road surface or road shoulder to allow for proper drainage; and

B. The depth of the grading activities is no deeper than 6 inches as measured from the road surface or shoulder of the road surface prior to the commencement of those grading activities.

Sec. 9. 23 MRSA §3360-A, sub-§6-C, as amended by PL 2011, c. 72, §6, is further amended to read:

6-C. Penalties. In an adjudicatory proceeding, the Public Utilities Commission may, in accordance with this subsection, impose an administrative penalty ~~for any violation of~~ on any person who violates this subsection. The administrative penalty may not exceed \$500, except that, if the person has been found in violation of this subsection within the prior 12 months, the administrative penalty may not exceed \$5,000. Administrative penalties imposed pursuant to this subsection are in addition to any other remedies or forfeitures provided by law and any liability that may result from the act or omission constituting the violation. Before imposing any penalties under this subsection, the commission shall consider evidence of the record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months. The commission may require a person who violates any provision of this section to

participate, at the expense of the violator, in an educational program developed and conducted by the system.

The Public Utilities Commission may impose administrative penalties for any of the following violations:

- A. Failure of an excavator to give notice of an excavation as required under subsection 3, except to the extent the excavator is exempt from the provisions of subsection 3 pursuant to other provisions of this section;
- B. Excavation by an excavator in a reckless or negligent manner that poses a threat to an underground facility;
- C. Excavation by an excavator that does not comply with the requirements of subsection 4-C, except to the extent the excavator is exempt from the provisions of subsection 4-C pursuant to subsection 5-C;
- D. Failure of an underground facility operator to mark the location of the operator's underground facilities within the time limits required by subsection 4;
- E. Marking by an underground facility operator of the location of an underground facility in a reckless or negligent manner; or
- F. Failure of an excavator to comply with the requirements of subsection 5-C, 5-D, 5-E, 5-I or 5-J.

The commission shall establish by rule standards for when and at what level penalties must be assessed under this subsection. Rules adopted under this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 10. 23 MRSA §3360-A, sub-§10, as enacted by PL 1991, c. 437, §10 and affected by §12, is repealed.

Sec. 11. 23 MRSA §3360-A, sub-§10-A is enacted to read:

10-A. Further notice requirements. The following provisions govern excavations in areas where there are underground facilities owned or operated by a person who is not an underground facility operator and who is not a voluntary member of the system established under subsection 1-A.

A. In addition to other notice requirements under this section and except for an employee with respect to that employee's employer's facility, an excavator shall notify any person who is not a member of the system and has underground facilities in the area of the proposed excavation. This notice must be in writing or in person.

B. If the underground facilities are located on private property and are owned and operated by the owner of that property:

(1) That landowner may mark the underground facilities in accordance with paragraph D;

(2) The excavator may wait 3 business days from the date of notification to commence the excavation or may commence the excavation upon notification;

(3) If the excavator waits 3 business days from the date of notification or until after the underground facilities are marked, if sooner, to commence excavation or if the markings made by the landowner pursuant to subparagraph (1) fail to identify the location of the underground facilities in accordance with paragraph D, an excavator damaging or injuring underground facilities is not liable for any damage or injury caused by the excavation, except on proof of negligence; and

(4) If the excavator does not wait until the underground facilities are marked or 3 business days from the date of notification to commence excavation, whichever occurs earlier, the excavator is liable for all damages to the underground facilities as a result of the excavation.

C. If the underground facilities are located on private or public land and are owned and operated by a person other than the owner of the property where the excavation is to occur:

(1) The person who owns or operates the underground facilities shall mark the underground facilities in accordance with paragraph D; and

(2) The excavator shall wait until the underground facilities are marked or 3 business days from the date of notification, whichever occurs earlier, before commencing the excavation.

If an excavator complies with paragraph A and subparagraph (2) and if information pursuant to paragraph D is not provided within the time specified or if the information provided does not identify the location of the underground facilities in accordance with paragraph D, an excavator damaging or injuring underground facilities is not liable for any damage or injury caused by the excavation, except on proof of negligence.

D. A person who marks underground facilities under this subsection shall mark the location and size of the underground facilities in the proposed excavation area by marking the location of the facilities with stakes, with paint or by any other identifiable markings within 36 inches horizontally from the exterior sides of the underground facilities and if the depth is known the depth of the underground facilities. The person providing information shall respond no later than 2 full business days after receipt of the notice. It is the responsibility of the excavator to maintain those location markings until the excavations are completed.

Sec. 12. Convene a "dig safe" work group. The Public Advocate shall convene a work group, referred to in this section as "the work group," to examine, improve and enhance the underground facility damage prevention system established in the Maine Revised Statutes, Title 23, section 3360-A, subsection 1-A and referred to in this section as "the damage prevention system."

1. Chair. The Public Advocate shall serve as the chair of the work group.

2. Membership. When appointing members, the Public Advocate shall consider a fair representation of members and nonmembers of the damage prevention system. The work group consists of 23 members as follows:

A. Twenty-two persons appointed by the Public Advocate:

(1) Two persons who are municipal public works officials, one of whom is from a municipality with a large population and one from a municipality with a small population. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Maine Municipal Association;

(2) Three persons who are builders or contractors who conduct business in geographically diverse areas of the State. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Associated Builders and Contractors of Maine;

(3) Three persons who are general contractors who conduct business in geographically diverse areas of the State. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Associated General Contractors of Maine;

(4) One person with expertise in the damage prevention system who does not represent an active excavator or underground facility operator. The Public Advocate shall consider any person with appropriate expertise who submits a request to be appointed under this subparagraph;

(5) Two persons who represent quasi-municipal water or sewer utilities, one of whom represents a small utility and one of whom represents a large utility. The Public Advocate shall consider any recommendation for the person to represent a small utility submitted by the Maine Rural Water Association. The Public Advocate shall consider any recommendation for the person to represent a large utility submitted by the Maine Water Utilities Association;

(6) Two persons who represent telephone utilities, one of whom represents a small rural telephone utility and one of whom represents a large telephone utility. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Telephone Association of Maine;

(7) One person representing cable television service providers in the State;

(8) Two persons representing owners or operators of underground fuel facilities. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by the Maine Energy Marketers Association;

(9) One person representing the owner or operator of a natural gas pipeline;

(10) One person representing investor-owned transmission and distribution utilities;

(11) One person representing consumer-owned transmission and distribution utilities;

(12) One person who represents the Dig Safe system. The Public Advocate shall consider any recommendations for appointments under this subparagraph submitted by Dig Safe System, Inc.; and

(13) Two municipal officials or persons representing municipal officials; and

B. The Public Advocate.

3. Convening. The Public Advocate shall convene the work group no later than 60 days following the effective date of this section.

4. Duties. The work group, in consultation with the Public Utilities Commission, shall examine ways to facilitate the creation of a centralized one-call system to notify the operators of underground facilities of pending excavations. This examination must include, but is not limited to:

A. Creating a new apportionment of the costs of membership in the damage prevention system so that members could pay a flat fee for each notification of pending excavation;

B. Authorizing an operator who is not a member of the damage prevention system to be subject to administrative penalties for violations of Title 23, section 3360-A;

C. Requiring an operator who is not a member of the damage prevention system to maintain insurance when an excavator is working on that operator's underground facilities;

D. Identifying appropriate tolerance zones for marking different types of underground facilities;

E. Developing a process for the commission to keep records of successful markings or excavations completed by members of the damage prevention system; and

F. Evaluating the need for an ongoing advisory board to provide input to the commission regarding the damage prevention system. The work group shall consider staffing requirements, membership, funding and the scope of responsibility for the advisory board.

5. Staff assistance. To the extent possible within existing resources, the Public Advocate and the Public Utilities Commission shall provide necessary staffing services to the work group.

6. Report. No later than January 15, 2013, the Public Utilities Commission and the Public Advocate shall jointly submit a report to the joint standing committee of the Legislature having jurisdiction over energy, utilities and technology matters that includes all findings and recommendations of the work group that are supported by at least 2/3 of the appointed members of the work group. The commission shall submit to the First Regular Session of the 126th Legislature by January 15, 2013 any legislation necessary to carry out the recommendations of the work group and provisionally adopted rules pursuant to Title 23, section 3360-A, subsection 13 necessary to carry out the recommendations of the work group.

Sec. 13. Rule adoption. Final adoption of portions of Chapter 895: Underground Facility Damage Prevention Requirements, a provisionally adopted major substantive rule of the Public Utilities Commission that has been submitted to the Legislature for review pursuant to the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A, is authorized only if the commission:

1. Modifies the notification requirements of excavators to notify private property owners that own and operate underground facilities on their property in accordance with this Act;

2. Requires a 36-inch tolerance zone for marking underground facilities operated by nonmember operators;

3. Removes the requirement that the commission include the number of excavations and markings by a respondent in the past 12 months that did not result in a violation of the so-called dig safe law or rules on a notice of enforcement investigation;

4. Permits a respondent to request an adjudicatory hearing only after an informal review and requires that the commission approve any request by a respondent to waive the informal review; and

5. Corrects a cross-reference to the definition of an underground facility operator in section 6 of the rule.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

In House of Representatives, 2012

Read twice and passed to be enacted.

..... Speaker

In Senate, 2012

Read twice and passed to be enacted.

..... President

Approved 2012

..... Governor