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ENERGY, UTILITIES AND TECHNOLOGY

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**STATE OF MAINE
HOUSE OF REPRESENTATIVES
125TH LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT “ ” to H.P. 1329, L.D. 1803, Bill, “An Act To Implement the Recommendations of the Dig Safe Work Group”

Amend the bill by inserting after the title and before the enacting clause the following:

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,'

Amend the bill by inserting after section 2 the following:

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:

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

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

8 **5-D. Exemption; cemeteries.** An excavator is exempt from the notice requirements
9 of subsection 3 and subsection ~~40~~ 10-A for any excavation undertaken within the
10 boundaries of a cemetery if the following procedures are followed.

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

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

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

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

26 **Sec. 7. 23 MRSA §3360-A, sub-§5-I, ¶¶B and C**, as enacted by PL 2011, c.
27 72, §4, are amended to read:

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

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

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

37 (2) Owners and operators of underground facilities in the area identified pursuant
38 to subparagraph (1) shall mark those facilities in accordance with subsections 4
39 and ~~40~~ 10-A, as applicable. Thereafter, the owner or operator of the quarry or
40 borrow pit shall maintain sufficient records or markings to identify the location of
41 underground facilities within the area identified pursuant to subparagraph (1) and

1 an excavator undertaking an excavation in that area is exempt from any further
2 notice requirements under subsection 3 and subsection ~~4~~ 10-A.

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

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

7 **5-K. Exemption; unpaved private road grading.** A person is exempt from the
8 requirements of this section for any grading activities undertaken on private roads that
9 meet the following criteria:

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

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

15 Amend the bill by striking out all of sections 4 and 5 and inserting the following:

16 **'Sec. 4. 23 MRSA §3360-A, sub-§10,** as enacted by PL 1991, c. 437, §10 and
17 affected by §12, is repealed.

18 **Sec. 5. 23 MRSA §3360-A, sub-§10-A** is enacted to read:

19 **10-A. Further notice requirements.** The following provisions govern excavations
20 in areas where there are underground facilities owned or operated by a person who is not
21 an underground facility operator and who is not a voluntary member of the system
22 established under subsection 1-A.

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

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

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

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

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

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

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

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

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

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

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

27 **Sec. 6. Convene a "dig safe" work group.** The Public Advocate shall convene
28 a work group, referred to in this section as "the work group," to examine, improve and
29 enhance the underground facility damage prevention system established in the Maine
30 Revised Statutes, Title 23, section 3360-A, subsection 1-A and referred to in this section
31 as "the damage prevention system."

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

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

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

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

- 1 (2) Three persons who are builders or contractors who conduct business in
2 geographically diverse areas of the State. The Public Advocate shall consider any
3 recommendations for appointments under this subparagraph submitted by the
4 Associated Builders and Contractors of Maine;
- 5 (3) Three persons who are general contractors who conduct business in
6 geographically diverse areas of the State. The Public Advocate shall consider any
7 recommendations for appointments under this subparagraph submitted by the
8 Associated General Contractors of Maine;
- 9 (4) One person with expertise in the damage prevention system who does not
10 represent an active excavator or underground facility operator. The Public
11 Advocate shall consider any person with appropriate expertise who submits a
12 request to be appointed under this subparagraph;
- 13 (5) Two persons who represent quasi-municipal water or sewer utilities, one of
14 whom represents a small utility and one of whom represents a large utility. The
15 Public Advocate shall consider any recommendation for the person to represent a
16 small utility submitted by the Maine Rural Water Association. The Public
17 Advocate shall consider any recommendation for the person to represent a large
18 utility submitted by the Maine Water Utilities Association;
- 19 (6) Two persons who represent telephone utilities, one of whom represents a
20 small rural telephone utility and one of whom represents a large telephone utility.
21 The Public Advocate shall consider any recommendations for appointments
22 under this subparagraph submitted by the Telephone Association of Maine;
- 23 (7) One person representing cable television service providers in the State;
- 24 (8) Two persons representing owners or operators of underground fuel facilities.
25 The Public Advocate shall consider any recommendations for appointments
26 under this subparagraph submitted by the Maine Energy Marketers Association;
- 27 (9) One person representing the owner or operator of a natural gas pipeline;
- 28 (10) One person representing investor-owned transmission and distribution
29 utilities;
- 30 (11) One person representing consumer-owned transmission and distribution
31 utilities;
- 32 (12) One person who represents the Dig Safe system. The Public Advocate shall
33 consider any recommendations for appointments under this subparagraph
34 submitted by Dig Safe System, Inc.; and
- 35 (13) Two municipal officials or persons representing municipal officials; and

36 B. The Public Advocate.

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

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

- 1 A. Creating a new apportionment of the costs of membership in the damage
2 prevention system so that members could pay a flat fee for each notification of
3 pending excavation;
- 4 B. Authorizing an operator who is not a member of the damage prevention system to
5 be subject to administrative penalties for violations of Title 23, section 3360-A;
- 6 C. Requiring an operator who is not a member of the damage prevention system to
7 maintain insurance when an excavator is working on that operator's underground
8 facilities;
- 9 D. Identifying appropriate tolerance zones for marking different types of
10 underground facilities;
- 11 E. Developing a process for the commission to keep records of successful markings
12 or excavations completed by members of the damage prevention system; and
- 13 F. Evaluating the need for an ongoing advisory board to provide input to the
14 commission regarding the damage prevention system. The work group shall consider
15 staffing requirements, membership, funding and the scope of responsibility for the
16 advisory board.

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

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

29 **Sec. 7. Rule adoption.** Final adoption of portions of Chapter 895: Underground
30 Facility Damage Prevention Requirements, a provisionally adopted major substantive rule
31 of the Public Utilities Commission that has been submitted to the Legislature for review
32 pursuant to the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A, is
33 authorized only if the commission:

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

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

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

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

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

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

8 Amend the bill by relettering or renumbering any nonconsecutive Part letter or
9 section number to read consecutively.

10 **SUMMARY**

11 This amendment creates an exemption from the requirement to notify the
12 underground facility damage prevention system, established pursuant to the so-called dig
13 safe law, for grading completed on private unpaved roads. It also changes the
14 circumstances under which an excavator notifies a private landowner of excavations that
15 occur on that landowner's property and the excavator's liability for work completed on
16 that land. This amendment specifies the membership of the "dig safe" work group,
17 changes the requirement that the work group convene within 30 days of the effective date
18 of the bill to 60 days, as well as adds additional items to the work group's scope of work.
19 Finally, this amendment addresses major substantive rulemaking proposed for
20 authorization in L.D. 1790, H.P. 1315, "Resolve, Regarding Legislative Review of
21 Portions of Chapter 895: Underground Facility Damage Prevention Requirements, a
22 Major Substantive Rule of the Public Utilities Commission," by conditionally authorizing
23 final adoption of portions of Chapter 895 only if the Public Utilities Commission makes
24 specific changes to the rule.

25 This amendment also adds an emergency preamble and emergency clause to the bill.

26 **FISCAL NOTE REQUIRED**

27 **(See attached)**