

ASSEMBLY, No. 776

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Assemblywoman BUONO and Assemblyman R. SMITH

1 AN ACT concerning underground facilities, and amending and
2 supplementing P.L.1994, c.118, and amending P.L.1989, c.80.

3
4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6
7 1. Section 1 of P.L.1994, c.118 (C.48:2-73) is amended to read as
8 follows:

9 1. Sections 1 through 19 of P.L.1994, c.118 (C.48:2-73 to
10 C.48:2-91, inclusive) and sections 10 through 13 of [this act]
11 P.L.19 , c. (C.) (now before the Legislature as this bill) shall be
12 known and may be cited as the "Underground Facility Protection
13 Enforcement Act."
14 (cf: P.L.1994, c.118, s.1.)
15

16 2. Section 2 of P.L.1994, c.118 (C.48:2-74) is amended to read as
17 follows:

18 2. The Legislature finds and declares that damage to underground
19 facilities caused by excavation and the discharge of explosives poses
20 a significant risk to the public safety; that such damage to underground
21 natural gas facilities poses a substantial risk to the public safety; and
22 that the implementation of a comprehensive One-Call Damage
23 Prevention System can substantially reduce the frequency of damage
24 caused by these activities.

25 The Legislature therefore determines that it is in the public interest
26 for the State to require all operators of underground facilities to
27 participate in a One-Call Damage Prevention System and to require all
28 excavators to notify the One-Call Damage Prevention System prior to
29 excavation or demolition.

30 The Legislature further determines that the Board of Public Utilities
31 is the appropriate State agency to designate the operator of, and
32 provide policy oversight to, the One-Call Damage Prevention System

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

1 and enforce the provisions of this act; however, in those instances
2 where the Board of Public Utilities has not instituted civil penalty and
3 enforcement proceedings against the violator within a 30-day period
4 after the violation, a designated officer or agency representing the
5 county in which the violation occurs shall have the authority to bring
6 civil proceedings against the violator.

7 The Legislature further determines that the county prosecutor of
8 the county in which a violation of the criminal provisions of this act
9 occurs is the appropriate officer to bring criminal proceedings against
10 a person who violates these provisions.

11 (cf: P.L.1994, c.118, s.2.)

12
13 3. Section 3 of P.L.1994, c.118 (C.48:2-75) is amended to read as
14 follows:

15 3. As used in this act:

16 "30-day period after the violation" means the 30 days immediately
17 following the first day in which the violation occurred.

18 "Act" means the "Underground Facility Protection Enforcement
19 Act."

20 "Board" means the Board of Public Utilities;

21 "Business day" means any day other than Saturday, Sunday, or a
22 nationally or State recognized holiday;

23 "Damage" means any impact or contact with an underground
24 facility, its appurtenances or its protective coating or any weakening
25 of the support for the facility or protective housing, including, but not
26 limited to a break, leak, dent, gouge, groove, or other damage to the
27 facility, its lines, or their coating or cathodic protection.

28 "Designated county officer or agency" means an officer or agency,
29 designated by the governing body of a county in which a violation has
30 occurred, to bring civil penalty and enforcement proceedings against
31 a person who has violated any provision of this act, or any rule,
32 regulation or order adopted pursuant thereto, if the board has not
33 instituted civil penalty and enforcement proceedings against a violator
34 within a 30 day period after the violation;

35 "Emergency" means any condition constituting a clear and present
36 danger to life, health or property caused by the escape of any material
37 or substance transported by means of an underground facility or the
38 interruption of a vital communication or public service that requires
39 immediate action to prevent or mitigate loss or potential loss of the
40 communication or public service, or any condition on or affecting a
41 transportation right-of-way or transportation facility that creates a risk
42 to the public of potential injury or property damage;

43 "Excavate" or "excavating" or "excavation" or "demolition" means
44 any operation in which earth, rock, or other material in the ground is
45 moved, removed, or otherwise displaced by means of any tools,
46 equipment, or explosive, and includes but is not limited to drilling,

1 grading, boring, milling to a depth greater than six inches, trenching,
2 tunneling, scraping, tree and root removal, cable or pipe plowing,
3 fence post or pile driving, and wrecking, razing, rending, or removing
4 any structure or mass material, but does not include routine residential
5 property or right-of-way maintenance or landscaping activities
6 performed with non-mechanized equipment, excavation within the
7 flexible or rigid pavement box within the right-of-way, or the tilling of
8 soil for agricultural purposes to a depth of 18 inches or less;

9 "Excavator" means any person performing excavation or
10 demolition;

11 "Hand digging" means any excavation involving non-mechanized
12 tools or equipment, including but not limited to digging with shovels,
13 picks and manual post-hole diggers;

14 "Mechanized equipment" means equipment powered by a motor,
15 engine, or hydraulic, pneumatic or electrical device, including but not
16 limited to trenchers, bulldozers, power shovels, augers, backhoes,
17 scrapers, drills, cable and pipe plows, and other equipment used for
18 plowing-in cable or pipe, but does not include tools manipulated solely
19 by human power;

20 "One-Call Damage Prevention System" means the communication
21 system established pursuant to section 4 of this act;

22 "Operator" means a person owning or operating, or controlling the
23 operation of, an underground facility, but shall not include a
24 homeowner who owns only residential underground facilities, such as
25 an underground lawn sprinkler system or an underground structure for
26 a residential low-voltage lighting system;

27 "Person" means any individual, firm, joint venture, partnership,
28 corporation, association, State, county, municipality, public agency or
29 authority, bi-state or interstate agency or authority, public utility,
30 cooperation association, or joint stock association, and includes any
31 trustee, receiver, assignee, or personal representative thereof;

32 "Public entity" means any federal, State, county or municipal entity
33 responsible for issuing road opening, building, blasting, demolition or
34 excavation permits;

35 "Site" means the specific place where excavation work is performed
36 or to be performed and shall be identified by street address referenced
37 to the nearest intersecting street and sub-division name, if applicable,
38 as well as by lot and block number, if available and by kilometer or
39 mile marker for railways;

40 "State department or agency" means any department, public
41 authority, public agency, public commission, or other political
42 subdivision of the State, including any county, municipality or political
43 subdivision thereof.

44 "Underground facility" means any public or private personal
45 property which is buried, placed below ground, or submerged on a
46 right-of-way, easement, public street, other public place or private

1 property and is being used or will be used for the conveyance of water,
2 forced sewage, telecommunications, cable television, electricity, oil,
3 petroleum products, gas, optical signals, or traffic control, or for the
4 transportation of a hazardous liquid regulated pursuant to the
5 "Hazardous Liquid Pipeline Safety Act of 1979" (49 U.S.C. app. §
6 2001 et seq.), but does not include storm drains or gravity sewers.
7 (cf: P.L.1994, c.118, s.2.)
8

9 4. Section 10 of P.L.1994, c.118 (C.48:2-82) is amended to read
10 as follows:

11 10. a. An excavator shall notify the One-Call Damage Prevention
12 System established pursuant to section 4 of this act of his intent to
13 engage in excavation or demolition not less than three business days
14 and not more than 10 business days prior to the beginning of the
15 excavation or demolition.

16 b. Upon notifying the One-Call Damage Prevention System, an
17 excavator shall provide the following information:

18 (1) The name and telephone number of the person notifying the
19 system;

20 (2) The name, address, and office and field telephone numbers and
21 facsimile numbers of the excavator;

22 (3) The name, address and telephone number of the person for
23 whom the excavation work is to be performed; and

24 (4) The specific site location, starting date, starting time and
25 description of the intended excavation or demolition, including the
26 approximate depth of the excavation or demolition.

27 c. Where appropriate to provide clarification, an excavator shall
28 mark and identify the perimeter of the proposed site of the excavation
29 by the color white prior to notifying the One-Call Damage Prevention
30 System of his intent to engage in excavation or demolition.

31 d. An excavator shall:

32 (1) Not operate any mechanized equipment within two feet
33 horizontally of the outside wall of any underground facility marked in
34 accordance with the provisions of this act, or marked in accordance
35 with any rule, regulation, or order adopted pursuant to this act, unless
36 the underground facility has first been located by hand digging.
37 Mechanized equipment shall be used with proper care and under
38 adequate supervision to avoid damage to the underground facility;

39 (2) Plan the excavation or demolition to avoid damage to and to
40 minimize interference with underground facilities;

41 (3) Use reasonable care during excavation or demolition to avoid
42 damage to or interference with underground facilities; and

43 (4) After commencement of excavation or demolition, protect and
44 preserve the marking, staking, or other designation of an underground
45 facility until the marking, staking, or other designation is no longer
46 necessary for safe excavation or demolition.

1 e. An excavator shall immediately report to the operator of an
2 underground facility any damage to the underground facility caused by
3 or discovered by the excavator in the course of an excavation or
4 demolition.

5 f. If any excavation or demolition is not initiated within 10 business
6 days of the starting date of the intended excavation or demolition
7 which was given by the excavator to the One-Call Damage Prevention
8 System pursuant to subsection b. of this section, the excavator shall
9 again notify the One-Call Damage Prevention System of his intent to
10 engage in excavation or demolition pursuant to the provisions of this
11 act.

12 (cf: P.L.1994, c.118, s.10.)

13

14 5. Section 14 of P.L.1994, c.118 (C.48:2-86) is amended to read
15 as follows:

16 14. a. Whenever it appears to the board that a person has violated
17 any provision of this act, or any rule, regulation or order adopted
18 pursuant thereto, it [may] shall issue an order specifying the provision
19 or provisions of this act, or the rule, regulation or order of which the
20 person is in violation, citing the action which constituted the violation,
21 ordering abatement of the violation, and giving notice to the person of
22 his right to a hearing on the matters contained in the order. Such
23 order shall be effective upon receipt and any person to whom such
24 order is directed shall comply with the order immediately.

25 b. The board [may] shall institute an action or proceeding in the
26 Superior Court for injunctive and other relief for any violation of this
27 act, or of any rule or regulation adopted pursuant to this act within a
28 30-day period after the violation and the court may proceed in the
29 action in a summary manner. In any such proceeding the court may
30 grant temporary or interlocutory relief, notwithstanding the provisions
31 of R.S.48:2-24.

32 Such relief may include, singly or in combination:

33 (1) A temporary or permanent injunction; and

34 (2) Assessment of the violator for the costs of any investigation,
35 inspection, or monitoring survey which led to the establishment of the
36 violation, and for the reasonable costs of preparing and litigating the
37 case under this subsection. Assessments under this subsection shall be
38 paid to the State Treasurer.

39 The board or an affected operator may institute an action in the
40 Superior Court to enjoin a person whose repeated failure to comply
41 with the provisions of this act constitutes a threat to public safety from
42 engaging in any further excavation or demolition work within the
43 State, except under such terms and conditions as the Superior Court
44 may prescribe to ensure the safety of the public.

45 c. The provisions of section 16 of [this act] P.L.1994, c.118
46 (C.48:2-88) to the contrary notwithstanding, a person who is

1 determined by the board, after notice and opportunity to be heard, to
2 have violated any provision of this act or any rule, regulation, or order
3 adopted pursuant thereto with respect to a natural gas underground
4 pipeline or distribution facility, or a hazardous liquid underground
5 pipeline or distribution facility, shall be liable to a civil penalty [not to
6 exceed] not less than \$25,000 for each violation for each day the
7 violation continues[, except that the maximum civil penalty may not
8 exceed \$500,000 for any related series of violations].

9 Any civil penalty imposed pursuant to this subsection [may] shall
10 not be compromised by the board. In determining the amount of the
11 penalty, [or the amount agreed upon in compromise,] the board shall
12 consider the nature, circumstances, and gravity of the violation; the
13 degree of the violator's culpability; any history of prior violations; the
14 prospective effect of the penalty on the ability of the violator to
15 conduct business; any good faith effort on the part of the violator in
16 attempting to achieve compliance; the violator's ability to pay the
17 penalty; and other factors the board determines to be appropriate.

18 The amount of the penalty when finally determined, [or the amount
19 agreed upon in compromise,] may be deducted from any sums owing
20 by the State to the person charged, or may be recovered, if necessary,
21 in a summary proceeding pursuant to "the penalty enforcement law"
22 (N.J.S.2A:58-1 et seq.). The Superior Court shall have jurisdiction
23 to enforce the provisions of "the penalty enforcement law" in
24 connection with this act.

25 d. Pursuit of any remedy specified in this section shall not preclude
26 the pursuit of any other remedy, including any civil remedy for damage
27 to an operator's underground facilities or for damage to a person's
28 property, provided by any other law. Administrative and judicial
29 remedies provided in this section may be pursued simultaneously.

30 e. If the board does not institute civil penalty and enforcement
31 proceeding against a violator of any provisions of this act within a
32 30-day period after the violation, the board shall so notify the
33 governing body of the county in which the violation occurred, which
34 county may, by ordinance or resolution, as appropriate, designate a
35 county officer or agency to pursue any civil remedy provided for
36 pursuant to this act for damage to an operator's underground facilities
37 or for damage to a person's property. The designated county officer
38 or agency may institute a civil action or proceeding in the Superior
39 Court for injunctive and other appropriate relief for any violation of
40 this act, or of any rule or regulation adopted pursuant to this act and
41 the court may proceed in the action in a summary manner. In any such
42 proceeding the court may grant temporary or interlocutory relief,
43 notwithstanding the provisions of R.S.48:2-24.

44 Such temporary relief may include, singly or in combination:

45 (1) A temporary or permanent injunction; and

46 (2) Assessment of the violator for the costs of any investigation,

1 inspection, or monitoring survey which led to the establishment of the
2 violation, and for the reasonable costs of preparing and litigating the
3 case under this subsection. Assessments under this subsection shall be
4 paid to the county treasurer.

5 (cf: P.L.1994, c.118, s.14.)

6
7 6. Section 15 of P.L.1994, c.118 (C.48:2-87) is amended to read
8 as follows:

9 15. Any person who knowingly and willfully engages in an
10 excavation without:

11 a. First using the One-Call Damage Prevention System to
12 determine the location of underground facilities in the area being
13 excavated; or

14 b. Heeding appropriate location information or markings
15 established by any operator; or

16 c. Otherwise complying with the provisions of this act; and who
17 because of that violation damages an underground facility resulting in
18 death, serious bodily harm, or actual damage to property or loss of
19 service revenue exceeding \$50,000, or damages an underground
20 hazardous liquid pipeline facility resulting in the release of more than
21 50 barrels of product, shall, upon conviction, be guilty of a crime of
22 the third degree and shall be subject to the penalties set forth in
23 N.J.S.2C:43-3; except that the fine shall be the maximum provided for
24 pursuant to that section.

25 Notwithstanding any law, rule or regulation to the contrary, the
26 county prosecutor within the county in which a violation of the
27 provisions of this section occurs shall institute criminal proceedings
28 against the violator, and all fines imposed pursuant to such
29 proceedings shall be paid to the county treasurer.

30 Nothing in this section shall limit the jurisdiction of the board with
31 respect to natural gas pipeline safety or limit the jurisdiction of the
32 board, a designated county officer or agency, or a court of competent
33 jurisdiction with respect to the civil administrative penalty and
34 enforcement provisions of this act.

35 (cf: P.L.1994, c.118, s.15.)

36
37 7. Section 16 of P.L.1994, c.118 (C.48:2-88) is amended to read
38 as follows:

39 16. a. An operator or excavator, or the person who operates the
40 One-Call Damage Prevention System, who violates any provision of
41 this act or any rule or regulation or order adopted pursuant thereto
42 shall be liable to a civil penalty of not less than[\$1,000 and not more
43 than] \$2,500 per day for each day the violation continues[, except that
44 the maximum civil penalty may not exceed \$25,000 for any related
45 series of violations].

46 b. Any civil action pursuant to subsection a. of this section [may]

1 shall be brought in a court of this State by the board within a 30-day
2 period after the violation, or by a designated county officer or agency
3 if the board has not instituted such an action within that 30-day period,
4 or by an affected operator. Nothing in this act shall affect any civil
5 remedy for damage to an operator's underground facility or for actual
6 damage to any person's property.

7 (cf: P.L.1994, c.118, s.16.)

8

9 8. Section 18 of P.L.1994, c.118 (C.48:2-90) is amended to read
10 as follows:

11 18. All civil penalties recovered by the board pursuant to this act
12 shall be paid into the General Fund. All civil penalties recovered by
13 the designated county officer or agency pursuant to this act shall be
14 paid to the county treasurer.

15 (cf: P.L.1994, c.118, s.18.)

16

17 9. Section 1 of P.L.1989, c.80 (C.48:9-33) is amended to read as
18 follows:

19 1. a. Any person who is determined by the Board of Public
20 Utilities, after notice and opportunity to be heard, to have violated the
21 provisions of any law, rule, regulation, or order relating to natural gas
22 pipeline safety shall be subject to a civil penalty of not ~~[more]~~ less than
23 \$25,000 for each such violation for each day that the violation
24 persists[, except that the maximum civil penalty shall not exceed
25 \$500,000 for any related series of violations].

26 b. Any civil penalty imposed pursuant to subsection a. of this
27 section ~~[may]~~ shall not be compromised by the board. In determining
28 the amount of the penalty, ~~[or the amount agreed upon in~~
29 ~~compromise,]~~the board shall consider the nature, circumstances, and
30 gravity of the violation; the degree of the violator's culpability; any
31 history of prior violations; the prospective effect of the penalty on the
32 ability of the violator to conduct business; any good faith on the part
33 of the violator in attempting to achieve compliance; his ability to pay
34 the penalty; and any other factors justice may require. The amount of
35 the penalty, when finally determined, ~~[or the amount agreed upon in~~
36 ~~compromise,]~~may be deducted from any sums owing by the State to
37 the person charged, or may be recovered in a summary proceeding
38 instituted by the board in Superior Court in accordance with "the
39 penalty enforcement law," N.J.S.2A:58-1 et seq.

40 c. Whenever it shall appear to the board that a person has violated,
41 intends to violate, or will violate any provision of any law, rule,
42 regulation, or order relating to natural gas pipeline safety, the board
43 ~~[may]~~ shall institute a civil action in Superior Court for injunctive
44 relief or for any other appropriate relief under the circumstances, and

1 the court may proceed on any such action in a summary manner.
2 (cf: P.L.1994, c.118, s.20)

3
4 10. (New section) a. A person appealing a civil administrative
5 penalty levied in accordance with the provisions of this act, whether
6 as a contested case pursuant to P.L.1968, c.410 (C.52:14B-1 et seq.)
7 or by appeal to a court of competent jurisdiction, shall, as a condition
8 of filing the appeal, post with the board or the designated county
9 officer or agency, as appropriate, a refundable bond, or other security
10 approved by the board or designated county officer or agency, as
11 appropriate, in the amount of the civil administrative penalty or
12 assessment levied pursuant to a civil administrative hearing. If the
13 civil administrative penalty or assessment is upheld in whole or in part,
14 the board or the designated county officer or agency, as appropriate,
15 shall be entitled to a daily interest charge on the amount of the
16 judgment from the date of the posting of the security until that amount
17 is paid in full. The rate of interest shall be that established by the New
18 Jersey Supreme Court for interest rates on judgments, as set forth in
19 the Rules Governing the Courts of the State of New Jersey.

20 b. A person who is assessed a civil administrative penalty, or is
21 subject to an assessment levied pursuant to the provisions of this act,
22 and fails to contest or to pay the penalty or assessment, or fails to
23 enter into a payment schedule with the board or the designated county
24 officer or agency, as appropriate, within 30 days of the date that the
25 penalty or assessment is due and owing, shall be subject to an interest
26 charge on the amount of the penalty or assessment from the date that
27 the amount was due and owing. The rate of interest shall be that
28 authorized pursuant to subsection a. of this section.

29 c. Any person who fails to pay a civil administrative penalty or
30 assessment, in whole or in part, when due and owing, or who fails to
31 agree to a payment schedule therefor, shall be subject to the civil
32 penalty provisions of this act, as appropriate.

33 d. A civil administrative penalty or assessment imposed pursuant
34 to a final order:

35 (1) may be collected or enforced by summary proceeding in a court
36 of competent jurisdiction in accordance with the "penalty enforcement
37 law," (N.J.S.2A:58-1 et seq.); or

38 (2) shall constitute a debt of the violator, and the civil
39 administrative penalty may be docketed with the clerk of the Superior
40 Court, and shall have the same standing as any judgment docketed
41 pursuant to N.J.S.2A:16-1.

42
43 11. (New section) In each county in which criminal charges are
44 instituted by the county prosecutor pursuant to this act, and in each
45 county in which civil enforcement action is instituted by a designated
46 county officer or agency, a report shall be prepared and filed with the

1 board by the prosecutor or designated officer or agency, as
2 appropriate, at the time the action is instituted, and such report shall
3 be followed by a subsequent report on the outcome of the action.

4
5 12. (New section) After consultation with the Attorney General,
6 the board shall report to the Governor and the Legislature and every
7 county in this State within three months of the effective date of this
8 act, and not later than every third month thereafter. Each report shall
9 include information on the number of violations and where they
10 occurred, the amount of fines assessed for each occurrence, the
11 number and amount of fines paid for each occurrence, and any
12 recommendations of the board regarding the expansion of, or changes
13 in, the program.

14
15 13. (New section) The board shall adopt, pursuant to the
16 "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et
17 seq.), any rules and regulations necessary to effectuate the purposes
18 of this 1995 amendatory and supplementary act.

19
20 14. This act shall take effect immediately.

21 22 23 STATEMENT

24
25 This bill amends and supplements P.L.1994, c.118 (C.48:2-73 et
26 seq.), the "Underground Facilities Protection Act," and amends
27 P.L.1989, c.80 (C.48:9-33 et seq.) to provide for the increased
28 enforcement of these laws by changing their civil and criminal penalty
29 provisions; providing for the re-notification of the One-Call Damage
30 Prevention System if the intended excavation or demolition has not
31 commenced within a certain period of time; and requiring the Board
32 of Public Utilities (hereinafter, the "board") to issue quarterly reports
33 on violations of these laws to the Governor, the Legislature and all 21
34 counties of this State.

35 The bill increases civil penalties for violators who disrupt natural
36 gas or hazardous liquid substance pipelines from no more than
37 \$25,000 per violation per day not to exceed \$500,000 for any related
38 series of violations, to no less than \$25,000 per violation per day
39 without any cap on the total amount of fines. Civil penalties for
40 violators who disrupt all other underground facilities would increase
41 from no less than \$1,000 and no more than \$2,500 per violation per
42 day not to exceed \$25,000 for any related series of violations, to no
43 less than \$25,000 per violation per day without any cap on the totals.

44 The bill amends P.L.1994, c.118 (C.48:2-73 et seq.) to remove the
45 board's ability to compromise the civil penalties. The bill provides a
46 maximum time frame for violators to pay fines and establishes an

1 expedited process to consider appeals of fines.

2 The bill provides that governing bodies of counties where violations
3 occur may designate a county officer or agency to represent the
4 county in instituting civil proceedings against violators if the board
5 fails to institute penalty and enforcement proceedings within a 30-day
6 period after the violation. Civil penalties recovered by the designated
7 county officer or agency are to be paid to the county treasurer.

8 The bill provides that a violator who is convicted under the criminal
9 penalty provisions of section 15 of P.L.1994, c.118 (C.48:2-87) shall
10 be subject to the penalties provided pursuant to N.J.S.2C:43-3; but,
11 that the fine shall be no less than \$7,500. The bill further provides that
12 the county prosecutor within the county in which a violation of the
13 criminal provisions of this act occurred shall pursue criminal
14 proceedings against any person who violates the criminal provisions
15 of this act, and that fines imposed pursuant to criminal proceedings
16 shall be paid to the county treasurer.

17 The bill requires that if the excavation or demolition of a site is not
18 initiated within 10 business days of the starting date of intended
19 excavation or demolition given to the one-call system operator,
20 excavators to notify the one-call system operator again of their intent
21 to undertake excavation or demolition activities at that site under the
22 provisions of this act.

23 The bill requires the board to report quarterly to the Governor, the
24 Legislature and all 21 counties on the number of violations and where
25 they occurred, the amount of fines for each occurrence, and the
26 number and amount of fines paid for each occurrence. The bill allows
27 the board to issue rules and regulations to carry out the purposes of
28 the act.

29

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31

32

33 "Underground Facility Protection Enforcement Act."