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Joint Report on Dig Safe Work Group Recommendations 2012

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**OFFICE OF THE PUBLIC ADVOCATE
PUBLIC UTILITIES COMMISSION**

**JOINT REPORT
ON
DIG SAFE WORK GROUP
RECOMMENDATIONS**

**SUBMITTED TO THE JOINT STANDING
COMMITTEE ON
ENERGY, UTILITIES AND TECHNOLOGY**

JANUARY 13, 2012

I. Organizing the Dig Safe Work Group

The Dig Safe Work Group was established by the Legislature through its enactment of Public Law 2011, ch 72 (An Act to Clarify the Dig Safe Standards). The Legislature established a 23 member group, chaired by the Public Advocate, with members from 12 designated categories. In seven of those categories, the legislation identified organizations from which the Public Advocate was to consider recommendations to fill the slots provided for in the law. In the remaining categories, the law authorized the appointment of members by industry groups at the discretion of the Public Advocate.¹

All but one of the positions authorized by the law were filled through appointments directed by the Legislature or chosen by the Public Advocate. However, despite vigorous efforts, the Associated Builders and Contractors of Maine was unable to find a nominee to fill the fourth of its four member slots.²

Meetings of the Work Group were held on July 12th, July 19th, August 2nd, and September 15th (postponed from August 29th because several members had recovery responsibilities following Hurricane Irene) at the headquarters of the Department of Public Safety in the Commerce Center, Augusta. Pursuant to P.L. 2011 ch.72, the PUC was required to submit provisionally adopted rules reflecting changes recommend by the Work Group for the next legislative session. In order to provide the PUC with recommendations in sufficient time for

¹ A copy of PL 2011, ch 72 is included as Attachment A.

² A list of the members of the Dig Safe Work Group (broken down by the 12 appointment categories provided for in the law) is included as Attachment B.

the Commission to complete a rulemaking proceeding, the Work Group scheduled its meetings over a relatively short time-span.³

Participation in these meetings by Work Group members was quite high, with most members attending all four meetings, and all members attending at least three meetings. This high attendance was facilitated by allowing participation via a telephone link for those members who could not be physically present.⁴

II. Recommendations of the Work Group

A. Approval Standard

Pursuant to P.L. 2011, ch. 72, the Work group was charged with “examin[ing] ways to clarify and simplify the so-called Dig Safe laws and rules to facilitate compliance and to eliminate regulatory uncertainty.” Specifically, the Work Group was directed to examine, at least, the following matters:

1. Pre-excavation marking standards for excavators;
2. Marking standards for owners and operators of underground facilities;
3. Enforcement procedures and standards and the appropriate use of penalties; and
4. Clarification of incident reporting and ensuring that incident investigations involve appropriate fact-finding and do not assume or require inappropriate admission of fault.

³ For details of the Commission’s rulemaking proceeding, see Maine Public Utilities Commission, Amendments to Underground Facilities Damage Prevention Requirements (Chapter 895), Docket No. 2011-335.

⁴ A list of meeting dates for the Dig Safe Work Group is included as Exhibit C.

Additionally, P.L. 2011, Chapter 72, Section 8, sub-§6, required the Work Group to report all recommendations that were approved by a 2/3 majority of the Work Group's members. During the course of twelve hours of discussion and debate, the Work Group considered 13 recommendations proposed by its members. Of these 13 recommendations, 9 were ultimately approved by the 2/3 majority of appointed members required under P.L. 2011, Chapter 72, Section 8, sub-§6). This requirement for a super-majority (at least 15 affirmative votes out of 22 members) resulted in the approval of recommendations that had broad support from both underground facility operators members and excavator members (mostly contractors subject to the Dig Safe law).

Of the nine recommendations approved by the Work Group, five suggested amendments to Chapter 895 of the Commission's rules and were provisionally adopted by the Commission in a rulemaking proceeding during the fall of 2011. The remaining four recommendations would require statutory changes and are included in this report for consideration by the Legislature during the 2012 legislative session. Each approved recommendation of the Work Group is described below.

B. Approved Recommendations Requiring PUC Action

As discussed above, each of the recommendations in this section were forwarded to the Commission for consideration as amendments to Chapter 895. The Commission provisionally adopted amendments to Chapter 895 necessary to implement these recommendations by Order issued on January 3, 2012 in Docket No. 2011-335. The sections below provided the specific language voted on by the Work Group, the results of the vote, a description of the change and subsequent rulemaking action by the Commission.

1. Premarking

*Add language to Chapter 895, §4 (Responsibilities of the Excavator), Part A (Pre-marking) following the end of the 2nd sentence to read: "Alternative colors, pink or black, may be used by the excavator during snow or ice conditions." **Approved by a vote of 20-1.***

Prior to notifying the damage prevention system of the location of an intended excavation, Section 4(A) of Chapter 895 requires an excavator to mark the parameters of the intended excavation site with white paint or a single stake and an indication of the radius around the stake where the excavation is to occur. During winter months it has commonly been the practice for excavators to use pink or black paint to pre-mark intended excavation sites so the marks will be easily visible on snow or ice. The proposed amendment received from the Work Group formalizes this practice by allowing the use of black or pink paint during snow or ice conditions. The Commission made this change in the provisionally adopted rule.

2. Provision of Notice of Excavation to Private Property Owners

*Add to Chapter 895, §4 (Responsibilities of the Excavator), Part B (Notification), language to sub-section 2 (Additional notifications) that provides: As non member operators, private landowners in the area of a proposed excavation need to be notified by the excavator. The private landowner will not be required to mark out his facilities. The excavator will not be required to wait 72 hours from the time of notice to the private landowner to start the excavation. The excavator will be responsible for all damages to private underground facilities as a result of the excavation. **Approved by a vote of 15-4.***

Private property owners, specifically the owners of residential property, are often the operators of underground facilities, such as the water service lines and sewer laterals connected to their homes. As such, they are considered non-member operators under Chapter 895 and excavators are required to provide homeowners with the same notice given to any other non-member operator. Additionally, excavators must wait 72 hours after providing such notice before commencing excavation. Unlike other non-member operators, however,

homeowners are often unaware of the requirements of Chapter 895 and the location of their underground facilities. As a result, these facilities are rarely marked by homeowners and are often damaged during excavation. Excavators in the Work Group report that damage of this type is generally repaired by excavators as soon as it is discovered.

The Work Group decided to formalize this general practice while recognizing that notice to private landowners is often ineffective and of little value. The Work Group's recommended amendment requires excavators to provide notice to private landowners of intended excavation but allows the excavator to commence excavation without waiting for 72 hours to allow the private landowner to mark out facilities. Additionally, the Work Group's recommended amendment requires the excavator to be responsible for all damages to underground facilities that occur as a result of the excavation.

At the hearing held on November 4, 2011, in the Commission's rulemaking proceeding, Bangor Water District commented that the proposed amendment was unclear and could lead excavators to begin excavation without waiting 72 hours after notifying the damage prevention system and non-member operators such as water utilities and municipalities. The Commission agreed with this concern and clarified the final rule to require excavators to notify the Dig Safe System, and non-member operators other than residential private property owners, 72 hours prior to beginning excavation.

Title 23 M.R.S.A. § 3360-A(6) prohibits an excavator who performs the notice required by the section from being held liable for damages that result from the failure of facility operators to locate facilities as required pursuant to Section 3360-A(3-A) and (4) except on

proof of negligence. The Telephone Association of Maine (TAM) commented that the intent of the Work Group was to provide excavators the ability to commence excavation without waiting 72 hours after notifying private property owners, provided the excavator was willing to assume responsibility for any resulting damages, but that this should not preclude an excavator from waiting the additional 72 hours in order to gain the protection from liability contained in Section 3360-A(6) and that the proposed amendment should be revised to state this expressly. The Commission found this proposed revision reasonable and included this revision in the provisionally adopted rule.

Finally, the Associated General Contractors (AGC) stated that the intent of the Work Group was to limit the use of this section to notification of persons owning residences in the area of proposed excavation and therefore proposed additional language that would more narrowly define which private property owners the section will pertain to. Specifically, AGC recommended excluding non-residential property such as; commercial, mixed use, or industrial property. The Commission agreed with AGC and revised the provisionally adopted rule accordingly.

3. Indexing Facilities by Street

*Add language to Chapter 895, §6 (Responsibilities of the Operator), Part A, subsection 2 (Non-members), authorizing non-members to "index by street" in order to reduce their need to mark in areas in which there are no underground facilities. **Approved by a vote of 20-1.***

Facility operators who are not mandatory or voluntary members of the Dig Safe system, such as many municipalities, water and sewer districts, must still be notified of prospective excavations by excavators. To facilitate this process, the Commission maintains a database of non-member operators by municipality. An excavator can then locate a list of all

non-member operators within a municipality and provide notice of its intended excavation. The proposed rule allowed non-member operators to index their facilities by street rather than by town, thereby decreasing the number of notifications made by excavators and received by non-member operators. Comments of Work Group members in the rulemaking proceeding indicated that the intent of the recommendation was to encourage non-member operators to participate in the Dig Safe System by allowing them to join without providing detailed maps, but rather by providing a list of facilities indexed by street. The comments argued the proposed amendment as drafted would act as a disincentive to Dig Safe membership by recreating a portion of the damage prevention system. The Commission agreed and moved the proposed amendment to Section 6(A)(1)(d). This has the effect of removing mapping requirements for members of the Dig Safe System. However, the Commission noted that member operators have an incentive to provide the most specific location information available in order to decrease the number of unnecessary notifications they receive.

4. Standardizing Tolerance Zones

*Add language to Chapter 895, §6 (Responsibilities of the Operator), Part B, sub-section 4 (b) (Tolerance zone) to standardize the Tolerance zone marking area to 18 inches for both member operators and non-member operators. **Approved by a vote of 19-2.***

When marking facilities present on an intended excavation site, facility operators are required to notify the excavator of the location of all underground facilities by marking a finite area designated as the "tolerance zone" on each side of the underground facility. Current Chapter 895 allows for an 18-inch tolerance zone for members of the damage prevention system and a 36-inch tolerance zone for non-members. The Work Group decided to

change the tolerance zone for non-member operators to 18 inches, thus making the requirement consistent for all facility operators.

Water and sewer districts argued against this change. In each instance, commenters in the Commission's rulemaking proceeding argued that water infrastructure was more difficult to locate precisely due to the depth of burial, material composition, and age of water and sewer facilities. AGC filed comments in support of the Work Group's recommended amendment arguing the change will bring Maine into accord with other New England states. In its order provisionally adopting the amendments necessary to implement the Work Group's recommendations, the Commission notes that this change will result in a shifting of risk, liability and costs to non-members, specifically water districts and municipalities, as acknowledged by stakeholders on both sides of the shift. Additionally, the Commission found that it was unclear that non-members, particularly water and sewer districts, will be able to locate their facilities with the degree of accuracy required by the Work Group's recommended amendment. However, P.L. 2011, ch. 72 requires the Commission to provisionally adopt rules necessary to implement the Work Group's recommendations. Accordingly, the Commission adopted this provision as recommended by the Work Group.

The Commission also received comments in its rulemaking in proceeding from Maine Rural Water Association and the Winthrop Utilities District arguing that water utilities would experience significant increases in costs associated with the decreased width of the tolerance zone for non-members from 36 inches to 18 inches. On the other hand, AGC argued that these costs are currently borne by excavators who must compensate for large tolerance zones by increased amounts of hand excavation. Neither party provided specific information

detailing that actual or projected costs associated with this shifting of responsibility. The Commission left this provision in the rule as it was recommended by the Work Group. However, the Legislature may want to consider the reasonableness of this apparent shift in costs associated with excavation.

5. Changes to Enforcement Procedures

*Amend Chapter 895, §7 (Commission Activities), Part B (Enforcement Action Procedure), by making changes to terminology, requiring additional information to be included with each Notice of Enforcement Action issued by the Commission and making changes to the process for requiring adjudicatory hearings before the Commission or an informal review and changes regarding consent agreements **Approved by a vote of 18-2.***

The Work Group approved a series of changes to Sections 7 (Enforcement Procedures) and 8 (Administrative Penalties) of Chapter 895 of the Commission's rules. These changes were provided to the Commission in the form of draft sections that were to replace the existing provisions. The changes resulting from this replacement are described below.

(a) Enforcement Action Procedures [Section 7(B)]

The Work Group approved two general nomenclature changes in Section 7(B). First, the term "Notice of Probable Violation" (NOPV) has been replaced with "Notice of Enforcement Investigation" (NOEI) and second, references to "probable violator" have been replaced with "potential violator." The Commission received no specific comments on these proposed changes and provisionally adopted them.

(b) Preliminary Incident Investigations [Section 7(B)(1)(a)]

The Work Group's proposed amendment requires the Commission staff assigned to investigate potential violations to determine the number of excavations and markings undertaken by the potential violator within the previous 12 months and determine how many were undertaken without a reported violation of Section 3360-A or Chapter 895. The Dig Safe System commented at the hearing held in this proceeding that this information was available to the Commission upon request. Accordingly, the Commission adopted this provision.

(c) Content of Notice of Enforcement Investigation [Section 7(B)(1)(c)]

The Work Group's proposed amendment adds a substantial amount of information to each NOEI issued by the Commission. Specifically, each NOEI will now include; 1) the specific subsection of 23 M.R.S.A. §3360-A(6-C) that may have been violated; 2) whether and to what extent there was damage to property; 3) the extent of any injury to a person or persons; 4) the number of violations by the respondent in the past 12 months; 5) the number of excavations and markings by the respondent in the past 12 months that did not result in a violation; 6) whether the respondent has been required to attend mandatory training sessions within the past 12 months for a violation of the same section of the law or rule that is the subject of the NOEI; 7) where applicable, an explanation of the legal basis for determining the respondent acted in a negligent or reckless manner; 8) whether Commission staff is recommending mandatory training or an administrative penalty; and 9) the amount of any administrative penalty recommended to resolve the matter. Finally, under the Work Group's proposed amendment, the NOEI will contain information on how the respondent can request an adjudicatory hearing.

Subsections 7(B)(1)(c)(iv) and (v) of the Work Group's proposed amendments require the Commission to provide the number of excavations where no violation of Section 3360-A or Chapter 895 occurred. Accordingly, the Work Group's proposed amendment suggests the Commission will determine that excavations were performed in total compliance with our rules in circumstances where there is no evidentiary foundation that such occurred. However, the only information available will be from the Dig Safe system indicating the number of markings and excavations undertaken, not whether they complied with all damage prevention requirements. TAM, in its comments suggested the appropriate response is for the Commission to assume there were no violations in situations where no investigation occurs and that, in essence, the Commission should presume innocence. The Commission does not believe this is sufficient for it to make such a finding. The Commission would remove this requirement; however, given that the Legislature required the Commission to provisionally adopt rules necessary to implement the Work Group's recommendations, the Commission adopted the provision as recommended by the Work Group.

(d) Adjudicatory Hearings [Section 7(B)(4)]

Under the current rule, a respondent who seeks to dispute the issuance of an NOEI must request an informal conference. Following the conference, the Commission's staff issues a recommended decision. If the recommended decision is adverse to the respondent, the respondent may request an adjudicatory hearing at any point within 30 days of receiving the recommended decision. The proposed amendment approved by the Work Group changes this requirement by removing the option of requesting a hearing after an informal review and instead requiring a respondent who wishes to dispute an NOEI to request an adjudicatory hearing within 30 days of receiving the NOEI. The result of this change is to

require respondents who wish to preserve the option of seeking an adjudicatory hearing before the Commission to request such a hearing within 30 days of receiving an NOEI even when the respondent seeks to contest the NOEI through informal review. Additionally, Section 7(B)(2) requires Commission staff to conduct an informal review whenever an NOEI is contested unless the respondent requests the informal conference be waived. This would require Commission staff to conduct an informal review even when the respondent contests the NOEI by requesting to proceed directly to an adjudicatory hearing. Accordingly, a respondent who wishes to proceed directly to an adjudicatory hearing would need to request both a hearing and the waiver of the informal conference. The Commission sought comments on ways to clarify or simplify the proposed process. TAM filed comments arguing that the language should be left as drafted given that it is neither inconsistent nor contradictory. The Commission found the provision as drafted by the Work Group unduly complicated and believes it will likely cause confusion among the respondents. Consequently, the Commission would remove this requirement; however, given that the Legislature requires the Commission to provisionally adopt rules necessary to implement the Work Group's recommendations; the Commission adopted the provision as drafted in the proposed amendment recommended by the Work Group.

(e) Consent Agreements [Section 7(B)(6)]

The Work Group's proposed amendment removes the requirement of the current rule that a respondent seeking to resolve an alleged violation by consent agreement must sign a consent agreement indicating it agrees to the terms of the consent agreement. Instead, the proposed amendment allows a respondent to only indicate that it does not contest the imposition of any penalties set forth in the NOEI. Additionally, the proposed amendment clarifies that a respondent who signs a consent agreement is not admitting to the alleged

violation or indicating agreement with any legal conclusion set forth in the NOEI. However, a NOEI resolved by consent agreement will be treated as a finding of violation for determination of future enforcement actions in accordance with Chapter 895. The Commission received no specific comments on this section and adopted it.

C. Approved Recommendations Requiring Legislative Action

In addition to recommended changes to Chapter 895 of the Commission's rules, the Work Group also makes the following recommendations that will require statutory changes. Each recommendation is described below and accompanied by draft statutory language that would implement the change.

1. Provide Authority for PUC to impose administrative penalties on state agencies for violations of Dig Safe laws or rules

State agencies, such as the Department of Transportation, are actively engaged in large scale construction and excavation activities. The Commission currently does not impose fines on state agencies that commit violations of Chapter 895 or Section 3360-A. The Work Group approved a recommendation that the Commission be explicitly granted this authority in order to further protect underground facilities by amending Title 23, § 3360-A(6-C) 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 this subsection. The commission may impose an administrative penalty on any violator, including a state agency. 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.

2. Add Definition of "Underground facility operator" to Title 38 Section 562-A to distinguish "jurisdictional" liquefied petroleum gas facilities from non-jurisdictional facilities

Title 23, Section 3360-A currently includes in the definition of "underground facility operator" the owner or operator of any underground facility other than underground oil storage facility as defined in Title 38, section 562-A, subsection 21; airport aviation fuel hydrant piping system; municipalities or public utilities with fewer than 5 full-time employees or fewer than 300 customers; or a person that owns underground facilities on its own property for commercial or residential purposes. The Work Group recommends amending this definition by specifically excluding propane distribution systems that are not included within the scope of safety regulation of the Commission in its role as an agent of the U. S. Department of Transportation. This change would remove any requirement that the operators of buried propane facilities not currently within the Commission's safety oversight be notified through the Dig Safe System of potential excavation in the area. To implement this change the Work Group and the Commission recommend amending 23 M.R.S.A. § 3360-A(1)(E) 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 not include liquefied

propane gas distributions systems not within the scope of 49 C.F.R. Part 192 and highway drainage culverts or under drains.

3. Dedicate Funds from Dig Safe Fines

Pursuant to 35-A M.R.S.A. § 117(3), the Commission is authorized to reimburse itself from an administrative penalty for certain investigative costs. After having deducted these amounts, the Commission may, if it chooses, apply any remaining funds to benefit customers who were affected by the incident leading to the violations or to the class or group of customers affected or potentially affected by the violation. Additionally, the Commission may distribute administrative penalties to supplement a low-income assistance or outreach program that the Commission determines would benefit customers affected or potentially affected by the violation resulting in the administrative penalty; to supplement the conservation program fund established pursuant to section 10110, subsection 7; to supplement the telecommunications education access funds established pursuant to Section 7104-B or to supplement any other program that the Commission determines would benefit customers affected. Any amounts from an administrative penalty that the Commission determines it does not wish to disburse pursuant to Section 117(3) are transferred to the State's General Fund.⁵

The Work Group determined that administrative penalties paid to resolve violations of 23 M.R.S.A. § 3360-A should be dedicated to further the prevention of damage to underground facilities in specific proportions through funding training by private non-profit groups; dissemination of damage prevention information through the use of radio, television and newspaper advertising; and the creation of grants to assist facilities operators in funding

⁵ Title 35-A M.R.S.A § 117(2).

mapping of their facilities. To implement this recommendation, the Work Group and the Commission recommend amending 23 M.R.S.A. § 3360-A to include the following language as subsection 6-E:

6-E. All amounts received by the commission due to the payment of administrative penalties imposed as a result of commission finding of violation of the 23 M.R.S.A. §3360-A law shall be allocated and used only for the purposes described in this section .

1. Administrative penalties collected by the commission through its enforcement of 23-A M.R.S.A. §3360-A shall be used solely for the following purposes:

- a. Promotion of the Damage Prevention program through marketing efforts, including but not limited to radio, television and print media;
- b. Training utilities and contractors subject to the requirements of 23 M.R.S.A. § 3360-A. in the use of the Damage Prevention System and methods of preventing damage to underground facilities. Training eligible to be funded through the use of administrative penalties shall be offered by or through organizations and programs including, but not limited to, Managing Underground Safety Training –Maine (MUST-Maine);
- c. Providing grant funding to support mapping of underground facilities to facilities operators that become first time members of the Dig Safe System during the calendar year during which the administrative penalties were collected; or
- d. Other purposes intended to encourage membership in the Damage Prevention System.

2. Administrative penalties collected by the commission pursuant to this section shall be dispersed in the following proportions:

- a. 5% of all funds collected shall be used pursuant to Section (C)(1)(a).
- b. 15% of all funds collected shall be used pursuant to Section (C)(1)(b).
- c. 80% of all funds collected shall be used pursuant to Section (C)(1)(c).
- d. Any funds collected during a calendar year that are not used pursuant to Sections (C)(1)(a) and (C)(1)(c) will be dispersed to fund additional training pursuant to Section (C)(1)(b).

3. Recipients of funds pursuant to Section (C)(1)(b) shall provide a report to the commission by February 1st that will include the number of training sessions provided, the number of individuals trained, names of companies participating in training, and a description of the training curriculum used.

4. Every second year, the commission shall submit to the committee of jurisdiction over public utilities recommendations regarding changes to the allocation of

collected administrative penalties and whether funds dispersed pursuant to Section (C)(1)(b) should be made available to train water and sewer districts in the requirements of Chapter 140 of the commission's rules.

4. Work Group to Review Ways to Create a True 1 Call System

Pursuant to 23 M.R.S.A. § 3360-A(1-A) underground facility operators are required to be members of the damage prevention system. However, the definition of "underground facility operators" contained in 23 M.R.S.A. § 3360-A(1)(F) excludes municipalities or a public utilities with fewer than 5 full-time employees or fewer than 300 customers or any person that owns underground facilities on its own property for commercial or residential purposes. Operators of underground facilities excluded from the definition of "underground facility operator" are referred to as non-member operators.

Non-member operators often operate extensive and vital underground facilities (such as water and sewer systems and municipal drainage facilities) and excavators are required to provide non-member operators with notice of pending excavations pursuant to Section 3360-A. In order to expedite the notification of non-member operators, the Commission maintains a database of non-member operators indexed by municipality that allows an excavator to determine if there are any non-member operated facilities in the area of pending excavation. This creates parallel notification systems and a corresponding additional burden to excavators. However, pursuant to 23 M.R.S.A. § 3360-A(1-A), the cost of operating the damage prevention systems is apportioned among its members and non-member operators are resistant to assuming the additional costs associated with such membership. Additionally, administrative penalties imposed pursuant to Section 3360-A are limited to members of the damage prevention system. Accordingly, non-member operators have no exposure to administrative penalties as a result of failing to locate and mark their underground facilities.

There was broad consensus among the members of the Work Group supporting the creation of a new working group to explore the creation of single one-call system. However, the Work Group was unable to reach agreement on the specific composition of such a group and therefore is unable to recommend specific statutory language to the Legislature with respect to its membership. However, with the hope that the membership issue can be resolved during the 2012 legislative session, the Work Group and the Commission provide the following proposed language to create the new work group.

Work group; Creation of a Single Damage Prevention System. The Dig Safe Work Group, referred to in this section as "the work group," is established.

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

2. Appointments; convening. All appointments must be made no later than 30 days following the effective date of this section.

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

1. 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;
2. Authorizing non-member operators to be subject to administrative penalties for violations of Section 3360-A; and
3. Requiring non-members to carry insurance when an excavator is working on their underground facilities.

4. Staff assistance. The Public Advocate and the Public Utilities Commission shall provide necessary staffing services to the work group.

5. Report. No later than January 15, 2013, the Public Utilities Commission and the chair of the work group shall jointly submit a report to the Joint Standing Committee on Energy, Utilities and Technology that includes all findings and recommendations supported by at least 2/3 of the appointed members of the work group. The commission shall also submit provisionally adopted rules to the First Regular Session of the 126th Legislature pursuant to the Maine Revised Statutes, Title 23, section 3360-A, subsection 13 necessary to carry out the recommendations of the work group and any legislation necessary to carry out the recommendations of the work group.

III. Conclusion

The Commission, the Public Advocate and the other Work Group Members look forward to the Committee's consideration of the Work Group recommendations during the 2012 legislation session.

IV. Attachments

- A. P.L. 2001, Chapter 72, An Act to Clarify the Dig Safe Standards
- B. Public Advocate's Nominations to Serve on Dig Safe Work Group
- C. Meetings of the Work Group

Attachment A

An Act To Clarify the Dig Safe Standards

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

Whereas, it is crucial to the public safety and welfare to clarify the so-called "Dig Safe" standards and procedures as soon as possible; 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:

NOTE: Sections 1-7 have been removed to save paper and space in this report.

Sec. 8. Work group; Dig Safe standards. The Dig Safe Work Group, referred to in this section as "the work group," is established.

1. Membership. 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 within 20 days of the effective date of this Act;

(2) Four 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 within 20 days of the effective date of this Act;

(3) Four 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 within 20 days of the effective date of this Act;

(4) One person with expertise in the underground facility 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 within 20 days of the effective date of this Act;

(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 a person representing a small utility submitted by the Maine Rural Water Association within 20 days of the effective date of this Act. The Public Advocate shall consider any recommendation for a person representing a large utility submitted by the Maine Water Utilities Association within 20 days of the effective date of this Act;

(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 within 20 days of the effective date of this Act;

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

(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 within 20 days of the effective date of this Act;

(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; and

(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. within 20 days of the effective date of this Act; and

B. The Public Advocate.

2. Chair. The Public Advocate serves as chair of the work group.

3. Appointments; convening. All appointments must be made no later than 30 days following the effective date of this section.

4. Duties. The work group, in consultation with the Public Utilities Commission, shall examine ways to clarify and simplify the so-called "dig safe" laws and rules to facilitate compliance and to eliminate regulatory uncertainty. The work group, in consultation with the Public Utilities Commission, shall examine at least the following matters:

A. Pre-excavation marking standards for excavators;

B. Marking standards for owners and operators of underground facilities;

C. Enforcement procedures and standards and the appropriate use of penalties; and

D. Clarification of incident reporting and ensuring that incident investigations involve appropriate fact-finding and do not assume or require inappropriate admission of fault.

5. Staff assistance. The Public Advocate and the Public Utilities Commission shall provide necessary staffing services to the work group.

6. Report. No later than January 15, 2012, the Public Utilities Commission and the chair of the work group shall jointly submit a report to the Joint Standing Committee on Energy, Utilities and Technology that includes all findings and recommendations supported by at least 2/3 of the appointed members of the work group. The commission shall also submit provisionally adopted rules to the Second Regular Session of the 125th Legislature pursuant to the Maine Revised Statutes, Title 23, section 3360A, subsection 13 necessary to carry out the recommendations of the work group and any legislation necessary to carry out the recommendations of the work group.

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

Effective 90 days following adjournment of the 125th Legislature, First Regular Session, unless otherwise indicated.

Attachment B

Appointees to serve on Dig Safe Work Group

Category

1. **Municipal public works officials** - 2 names (one from large community and one from small community)

Matt Doughty
Field Inspection Coordinator
City of Portland
55 Portland St.
Portland, ME 04101-2921
mmnd@portlandmaine.gov
874-8865 or 874-8801

David Kinney
Town Administrator
Town of Lincolnville
493 Hope Rd.
Lincolnville, ME 04849
tadmin@town.lincolnvillleme.us
763-3555

2. **Persons who are builders or contractors** – 4 names (from diverse areas of Maine)

Kevin Murphy
RJ Grondin and Sons
11 Bartlett Rd.
Gorham, ME 04038
k.murphy@grondinconstruction.com
(207) 854-1147

Marc Levesque
Director of Risk Management
On Target Utility Services
99 Enterprise Ave.
Gardiner, ME 04345
588-3314
mlevesque@ontargetservices.com

Bruce Hubbard
ETTI (directional boring co.)
bruce@hdd-etti.com

Vacant – no nominee

3. **Persons who are general contractors** – 4 names (from diverse areas of Maine)

Bruce Brown
Shaw Brothers Construction
PO Box 69
Gorham, ME 04038
839-2552
bbrown@shawbrothers.com

Tim Folster
Sargent Corp.
378 Bennoch Rd.
PO Box 435
Stillwater, ME 04489
tfolster@sargent-corp.com

Carl Wallace
Maine Drilling and Blasting
423 Brunswick Ave.
Gardiner, ME 04345
Office # 582-2338
Cell # 212-3316
cwallace@mdandb.com

Randy Gardner
Gardner Construction
505 Davis Road
Bangor, ME 04401
randy@gardnerconstructionenterprises.com

4. Person with expertise in underground facility damage prevention – not an excavator or operator

Stan Grover
36 Mary St.
West Gardiner, ME 04345
582-2512
scgmag@aol.com

5. Persons representing quasi-municipal water or sewer utilities – one small utility and one large

Kevin Ishihara
Portland Water District (large utility)
225 Douglass St.
PO Box 3553
Portland, ME 04104
774-5961 x. 3072
kishihara@pwd.org

Dan Wells
Superintendent
Winthrop Utilities District
Bowdoin St.
Winthrop, ME 04364
377-2712
winutil@fairpoint.net

6. Persons who represent telephone utilities – one small rural company and one large company

Ben Sanborn (small rural company)
Telephone Association of Maine
PO Box 5347
Augusta, ME 04330-5347
(207) 314-2609
ben@sanbornesq.com

Kathleen Dumaine (large company)
FairPoint Communications
900 Elm St. Floor 16
Manchester, NH 03101
(603) 645-3343
Kathleen.dumaine@fairpoint.com

7. Person representing cable television service providers in Maine

Lance Bolan
Time Warner Cable
118 Johnson Rd.
Portland, ME 04102
(207) 253-2501
Lance.bolan@twcable.com

8. Persons representing owners or operators of underground fuel facilities – two representatives

Alan Dow
Champagne's Energy
844 Old Post Rd.
Arundel, ME 04046
283-1518 or 800-564-1518
adow@champagnesenergy.com

Carl Bisson
Inergy Propane
100 Warren Ave.
Portland, ME 04103
797-7910
carl.bisson@inergyservices.com

9. Person representing owner or operator of a natural gas pipeline

Richard Bellemare
Unitil (Northern Utilities)
1075 Forest Ave. (PO Box 3586)
Portland, ME 04104-3586
(207) 541-2504
252-0488 cell
Bellemare@unitil.com

10. Person representing investor-owned transmission and distribution utility

Arthur Brown
Central Maine Power Co.
83 Edison Drive
Augusta, ME 04336
(207) 626-9562 office
(207) 242-8805 cell
Arthur.brown@cmpco.com

11. Person representing consumer-owned transmission and distribution utilities

Sharon Staz
Kennebunk Light and Power District
4 Factory Pasture Lane
Kennebunk, ME 04043
(207) 985-3311
sastaz@klpd.org

12. Person representing Dig Safe System

Robert Finelli
Executive Director
Dig Safe System Inc.
331 Montvale Ave.
Woburn, MA 01801
(781) 721-1191
bfinelli@digsafe.com
www.digsafe.com

Chair of Dig Safe Work Group

Richard Davies
Public Advocate
112 State House Station
Augusta, ME 04333-0112
(207) 287-2445
Richard.davies@maine.gov

Attachment C

Meetings held by the Dig Safe Work Group

July 12th	9 a.m. – noon
July 19th	1 p.m. – 4 p.m.
August 2nd	9 a.m. – noon
August 29th	1 p.m. – 4 p.m. Meeting postponed *
September 15th	1 p.m. – 4 p.m.

* The Aug. 29th meeting was postponed because several members had hurricane recovery responsibilities following Hurricane Irene.

All meetings of the Work Group were held in the Champlain Conference Room at the Maine Department of Public Safety, 45 Commerce Drive, in Augusta. Those members who were unable to attend a meeting in person had the option of participating by telephone.