

CONSTRUCTION OUTLOOK

OCTOBER, 2008

UCANE Interviews:



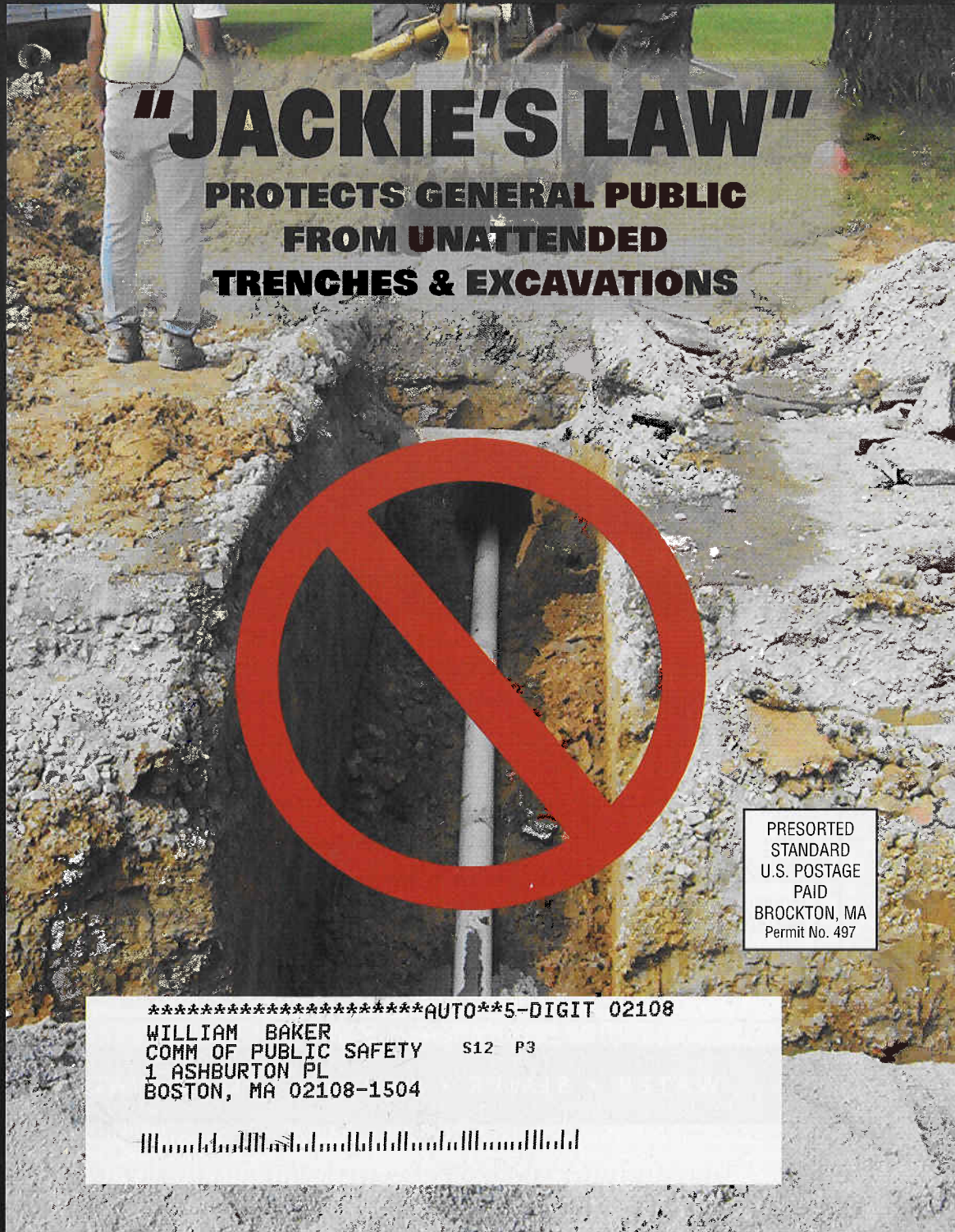
**Commissioner
LAURA MARLIN**
Dept. of Labor, Div. of
Occupational Safety



**Commissioner
THOMAS GATZUNIS**
Department of
Public Safety

In This Issue:

- Commercial Vehicle Inspection Program
- Civilian Flaggers vs. Police Details
- Thinking About Getting Into The Brownfields Redevelopment Business?



"JACKIE'S LAW"

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Beacon Hill Update



Civilian Flagger Regulations Approved

The Executive Office of Transportation and Public Works (EOTPW) implemented regulations governing the use of police details and flaggers at work sites throughout the Commonwealth effective October 2008. The roles and responsibilities in determining the use of flaggers versus police details and the role of awarding authorities and Construction Zone Safety Plans were clarified under 701 CMR 7.00 et. seq. (See Article "Civilian Flaggers vs. Police Details" page 9)

UCANE President Vincent Barletta testified at the public hearing, held September 15th, to relay the concerns of UCANE's members. The final regulations incorporated three of UCANE's recommendations, and partially addressed a fourth. In particular, UCANE's advocacy ensured that EOTPW adopted language for making sure "authorized representatives" are either impartial third parties or from the awarding authority. Likewise, EOTPW agreed with UCANE's suggestion to include the construction plan in the bid documents. EOTPW also inserted language relative to UCANE's concern about the need for flexibility in the event of an emergency. Finally, EOTPW included language relative to paying for police details and flaggers, but did not extend such language to municipalities.

Governor Patrick Makes 9C Cuts To 2009 Budget

With \$1 billion shortfall in the Fiscal Year 2009 state budget, Governor Patrick used his 9C authority, and made recommended cuts to appropriations to state agencies due to insufficient revenues to meet expenses.

Several proposals had been discussed to address the revenue deficiencies, including trimming state agency spending by 7%, cutting specific line-items from the FY 2008 budget, and tapping into the state's stabilization fund.



General Public Trench Safety Regulations Jackie's Law

Local officials across the state are expressing concerns that new state regulations governing the safety of excavations place an undue burden on municipalities – to the extent that they may be considered an unfunded mandate.

The regulations (520 CMR 14.00 et seq.), designed to prevent unauthorized access by the public to unattended trenches, were promulgated last November by the Department of Public Safety and the Division of Occupational Safety (DOS), as required by "Jackie's Law" (Ch. 82A).

The regulations require municipalities to establish a permitting authority responsible for the issuance of required permits for all trenches and the enforcement of the state regulations, such as trench inspections and the requirement that the public works department or local police details backfill, barricade, or cover any unattended or unsafe trench. Any trench excavated greater than three feet in depth, with 15 feet or less between soil walls as measured from the bottom, is subject to the new regulations.

UCANE has expressed its concerns to DOS Commissioner Laura Marlin regarding our members' concerns, specifically those which might cause unnecessary work delays, excessive fees and added reporting and administrative costs. (See article on page 19)

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"JACKIE'S LAW" PROTECTS GENERAL PUBLIC FROM UNATTENDED TRENCHES & EXCAVATIONS

UCANE's first dinner meeting of the fall season brought together two Massachusetts' officials responsible for new state trench permitting regulations, and contractors who had many questions and concerns regarding the readiness of municipalities to issue these permits which become effective January 1, 2009.

The meeting, held at the Sheraton Four Points Hotel, Norwood MA, gave UCANE members the opportunity to meet Commissioner Laura Marlin, Dept. of Labor, Division of Occupational Safety (DOS) and Hilary Eustace, Environmental Engineer for DOS, and later hear each review the salient requirements of the regulations.

Laura Marlin was appointed commissioner of DOS in May, 2007. The division promotes and protects workers' safety and health, wages and working conditions, and supports the Commonwealth's employers through a combination of workplace consultation and assessment, education, training, and administration and enforcement of applicable laws and regulations.

Hilary Eustace joined DOS in January, 2005, and was primarily responsible for writing the regulations. Bringing more than 20 years of experience in the areas of the environment, health, and safety, Ms. Eustace has conducted hundreds of on-site workplace assessments in areas ranging from trench safety to management of hazardous chemicals.

UCANE's featured speakers discussed the new trench regulation called "Jackie's Law" (520 CMR 14.00 et seq.), effective 1/1/09, which was designed to prevent the general public unauthorized access to unattended trenches, and requires municipalities to establish a permitting authority responsible for issuing required permits and administering the program.

Under the law and its regulation, all contractors doing public and private work, must obtain a trench permit from the municipality or agency in which it is located for all construction-related trenches in Massachusetts greater than three feet deep, on both private and public property, including roadways. The law requires that every trench must be either attended at all times or backfilled, covered with road plates, or fenced with stable fencing at least six feet high, when



Laura Marlin
Commissioner, Dept. of Labor
Division of Occupational Safety

not attended. This applies both during the workday and after construction is completed at the end of each day.

The evening concluded with an informative question and answer period. Some questions pertaining to practical situations which contractors face on a day-to-day basis were deferred and will be submitted to the Commissioner who will research the issues and provide a written response.

UCANE dinner meetings are a perfect forum to maintain open channels of communication between members of the construction industry and local, state and federal officials. UCANE members look forward to working with DOS to achieve the common goal of eliminating serious trench and excavation hazards and achieving absolute safety for the general public at construction sites. We thank both Commissioner Marlin and Ms. Eustace for their efforts to meet with our members. ■



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Commissioner
Department of Public Safety

Laura M. Marlin
Commissioner
Division of Occupational
Safety

Notice of New Regulation
Excavation & Trench Safety Regulation
520 CMR 14.00

- This new PUBLIC SAFETY regulation is required by statute and is designed to prevent the general public from falling into an unattended trench and suffering an injury or fatality. This regulation be enforced starting 1/1/09.
- Under the new regulation, a **trench** is defined as a subsurface excavation greater than 3' in depth, and is 15 feet or less between soil walls as measured from the bottom.
- All regulated trenches must be **attended, covered, barricaded, or backfilled**. Covers must be road plates at least ¾" thick or equivalent, barricades must be fences at least 6' high with no openings greater than 4" between vertical supports and all horizontal supports required to be located on the trench-side of the fencing.
- This applies to all construction-related trenches on public ways, public property, or private property.
- To ensure that all excavators are aware of and follow these new public safety regulations, a **permit** will be required prior to excavation of all regulated trenches.
- **All excavators** must obtain a trench permit for each trench site. The new trench permit will require information such as the name of excavator, the location of trench, a certificate of insurance, and the Dig Safe number.
- Under the regulation, municipalities must designate a **permitting authority** to issue the required permits for trenches on public ways or private property within the municipality. For state property, the relevant state authority will issue the permits.
- Municipalities may collect a reasonable **fee** to cover administrative costs of issuing permits.
- Permitting authorities are not required to conduct **inspections** of trenches for which they have issued permits. However, a permitting authority notified of a potential violation is authorized to take action, including an immediate shutdown, if violations of the new regulation are identified. Excavators may also be subject to administrative fines issued by the Department of Public Safety for violations.
- Municipal or state departments conducting excavations, such as a municipal water department or state highway authority, will be required to obtain a new trench permit.
- This new regulation in no way modifies or supersedes existing trench **worker safety** regulations. Workers in trenches must comply with the existing OSHA Excavation Standard, 29 CFR 1926, Subpart P. This new public safety regulation is entirely separate from and has no relationship to the existing trench worker safety standard.
- This is only a summary of the regulation. Please read the full regulation and obtain further information at www.mass.gov/dps or mass.gov/dos.
(See accompanying article/interview page 27)

UCANE Interviews



Commissioner
Laura M. Marlin
Department of Labor
Division of Occupational Safety
and
Commissioner
Thomas G. Gatzunis
Department of Public Safety



Thomas G. Gatzunis is a graduate of the University of Lowell and has served in municipal government for over twenty years.

Commissioner Gatzunis was employed by the Town of Belmont in 1983 and served in ever increasing roles of responsibility including Building Commissioner and Town Engineer; his duties included interpreting and enforcing the Massachusetts State Building Code and the Town's zoning and General By-Laws, as well as designing public work improvements and reviewing engineering and site plans.

In 1996, Commissioner Gatzunis was appointed by Governor Weld to the Board of Building Regulations and Standards. In 2002, he was appointed as Chairman of the Board where he served until April of 2004 when he was appointed by Governor Romney as Commissioner of the Department of Public Safety.

Commissioner Gatzunis is responsible for enforcing statutes and regulations which include hoisting, boiler, elevator and building safety, and oversees a staff of over 100 people. He has developed a legislative initiative strategy to bring the Department into the 21st century.

Laura M. Marlin was appointed Commissioner of the Division of Occupational Safety in May 2007. The Division promotes and protects workers' safety and health, wages and working conditions, and supports the Commonwealth's employers through a combination of workplace consultation and assessment, education and training, and administration and enforcement of applicable laws and regulations. Commissioner Marlin oversees six health and safety programs and three wage-related programs, encompassing more than 50 employees in seven offices across the Commonwealth.

Commissioner Marlin came to the Division after spending eight years in the Office of the Attorney General, where she served in the Fair Labor Division on a variety of outreach and educational initiatives, the Executive Bureau as Deputy Chief of Staff and, most recently as an Assistant Attorney General in the Criminal Bureau, prosecuting cases involving computer crimes, fraud, embezzlement and public corruption. In July 2006, Marlin was assigned to the team of state and federal prosecutors, State Police and federal agents investigating potential criminal charges stemming from the collapse of the I-90 Connector Tunnel.

The following are frequently asked questions concerning the new Excavation and Trench Safety Regulation 520 CMR 14.00, effective 1/1/09:

Q: What do the Trench Safety Regulations (520 CMR 14.00) require?

A: Generally, the Trench Safety Regulations require that unattended trenches be made safe for the General Public. Pursuant to the regulations enabling statute, **M.G.L. c. 82A**, the Trench Safety Regulations, included in 520 CMR 14.00, require excavators to obtain a permit prior to creating a trench on public or private property; require excavators to undertake certain safety precautions to make unattended trenches safe for the general public and prevent unauthor-

ized access; and subject excavators to penalties, including fines, for the failure to comply with the regulations. An "unattended trench" is defined as "a trench where neither the permit holder, excavator, or any of the people who work in or at the trench are present." It is important to note that these regulations require action to be taken by permit holders ahead of time to secure unattended trenches. These regulations do not prescribe worker safety regulations for employees in or at trenches, nor are the regulations intended to protect the general public from hazards inherent in trenches while the trenches are attended.

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Q: What is a trench?

A: According to M.G.L. c. 82A, §4 and 520 CMR 14.02, a trench is defined as "an excavation which is narrow in relation to its length, made below the surface ground in excess of three feet below grade and the depth of which is, in general, greater than the width, but the width of the trench, as measured at the bottom, is not greater than 15 feet."

Q: Why do the regulations require a permit to create a trench?

A: The regulations require excavators to obtain a permit because the statute requires excavators to obtain a permit. See M.G.L. c. 82A, §2. The permit ensures that the city, town or public agency is aware of trenches being created within its jurisdiction and also ensures that excavators are put on notice with regard to the safety requirements for trenches because permitting authorities are required to attach summaries of OSHA Regulation 1926 Subpart P-Excavations and the Excavation and Trench Safety Regulations included at 520 CMR 14.00, passed pursuant to M.G.L. c. 82A.

Q: What is a permitting authority?

A: A permitting authority is defined within the regulations as "a city, town or public agency required to administer the provisions of 520 CMR 14.03 [Permitting Requirements]." The statute, M.G.L. c. 82A, §2, states that "each city, town, or public agency shall designate 1 board or officer to issue permits for the excavation of trenches on privately owned land and for the excavation of a public way of a city or town." Under Article 89 of the Massachusetts Constitution, municipalities may choose to enact a by-law or regulation designating the board or officer that will act as the permitting authority for that city or town. While there are no prerequisites for designation as the permitting authority, the Department of Public Safety and the Division of Occupational Safety recommend the delegation to an individual or board/department presumed to have knowledge of excavation safety already, which may include local building officials or the building department; the fire chief or fire department; a DPW supervisor or board; or the city/town engineer.

Q: I am an excavator. Where may I obtain a permit and what is required?

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A: Who you obtain the permit from will depend on who owns or, in the case of a state agency, who owns or has care and control of the land on which you wish to make a trench. If the land is owned by a municipality or is private property, then the excavator must obtain a permit from the permitting authority as designated by the city or town. Cities and towns are authorized by statute to charge a reasonable fee for the permit. If the land is owned or controlled by a public agency or a public agency otherwise has a property interest in the land, such as in the case of an easement, then the excavator must obtain a permit from the permitting authority designated by that state agency.

To obtain a permit, the excavator must submit a completed application; a certificate of insurance indicating general liability coverage of \$100,000 per person and \$300,000 per claim or evidence of self-insurance in an equal amount (pursuant to M.G.L. c. 82A, §2); and the required fee, where applicable. The regulations at 520 CMR 14.03(4) require the excavator to provide the following information on the permit application:

- The Dig Safe number;
- Name & contact information for the permit holder (the person filing for the permit);
- Name and contact information of the excavator (the company performing the excavation);
- Name of the competent person;
- Name of the person(s) performing the excavation of the trench;
- Massachusetts hoisting license number for each person operating hoisting machinery during the excavation;
- Permit expiration date (where applicable);
- Specific location of the trench;
- Name and contact information of the insurer

The trench permit is similar to a street opening permit and the application for a trench permit may be included with that permit. Once issued, the permit must be posted in plain view at the trench worksite, such as in the window of a construction trailer.

Q: May permitting authorities charge fees for trench permits?

A: Yes. Municipal permitting authorities may charge a reasonable fee to cover the administrative costs of permitting the trench excavation. See M.G.L. c. 82A, §2 and 520 CMR 14.03(6). This fee is at the discretion of the municipality to determine what is reasonable in light of its administrative needs.

Q: Can permitting authorities impose time restrictions on issuing permits, such as requiring applicants to apply for the permit at least three days prior the planned excavation?


A: There is no explicit prohibition in the regulations, and the permitting authority is allowed to impose stricter regulations.

Q: Are excavators expected to obtain a permit before responding to an emergency, such as a water main break?

A: No. Permits are not required prior to creating a trench in response to an emergency. "Emergency" is defined in 520 CMR 14.02 as "an unforeseen condition in which the safety of the public is in imminent danger because of a threat to life or health or where immediate correction is required to maintain or restore essential public utility service." However, the excavator should complete a permit application with the permitting authority by the next business day, at the latest.

Q: I own a large construction company that frequently performs large jobs and may use multiple sub-contractors. I don't always

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Interview continued from page 31

know who the individual operating the excavation equipment or competent person will be at any one time on a complex project that may take several weeks or more, so how am I supposed to complete the permit application?

A: The Department of Public Safety and Division of Occupational Safety anticipate that the scope may vary from project to project. Accordingly, the permitting authority should realize that the specific competent person and person performing the excavation may change on complex projects. Therefore, information may be updated as necessary during the course of the project, provided however, that by pulling the permit, the permit holder impliedly agrees to act reasonably to ensure that up-to-date information is provided to the permitting authority.

Q: *What are the permitting requirements if I am creating a trench for a project that crosses municipal lines or jurisdictional lines, such as from state-owned land onto private property?*

A: You must obtain a permit from each relevant permitting authority.

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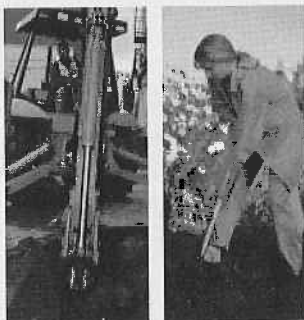


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Q: *What is a competent person and who on the excavation crew should this person be?*

A: A "competent person" is defined in the regulations as: "A person or persons who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to people, and who has authorization to take prompt corrective measures to eliminate them. A competent person must be able to demonstrate that he or she has been trained in and is knowledgeable about: soil analysis, the use of protections for the General Public and the requirements of this regulation." See 520 CMR 14.02. The first sentence of the definition is taken directly from OSHA's regulations.

Q: *What are municipalities and public agencies required to do under the trench regulations?*

A: Municipalities and public agencies are required to:

1. Establish a permitting authority;
2. Require permits for the creation of a trench on a public way, public property, or private property located within the municipality;
3. Shut down trenches where violations are found; and
4. Regulate municipal departments that create trenches.

Municipalities or public agencies that act as excavators are not exempt from these regulations and must adhere to the same standards for obtaining a permit and implementing protections for the General Public required of other excavators. Municipalities and state agencies are **not** required to inspect trenches and excavators are not required to "pass" a municipal or state inspection to be allowed to receive a trench permit. Nevertheless, when permitting authorities, the DOS, or the DPS are put on notice of a

potential violation of Chapter 82A or 520 CMR 14.00, they are authorized to investigate the possible violation and take action where a violation is determined to exist. Actions that municipal permitting authorities may take include immediately shutting down a trench site where a violation is found. Permitting authorities may further suspend or revoke a permit following the opportunity for an administrative hearing.

Q: *What are the safety precautions that I must take as an excavator?*

A: Whenever a trench will be **unattended** an excavator must take measures to provide adequate protections for the general public that will prevent unauthorized access to the unattended trench. According to 520 CMR 14.02, an "unattended trench" is "a trench where neither the permit holder, excavator, nor any of the people who work in or at the trench are present." When a trench is going to be unattended, excavators may choose one of 4 options to make the trench safe:

- Erect a fence that is at least 6' tall with openings no greater than 4" between vertical supports;
- Use a roadplate that is at least 3/4" thick steel;
- Post an attendant such as a police detail or flag man at the trench; or
- Backfill the trench before leaving.

Q: *I own a private construction company that already adheres to the OSHA requirements for protecting my employees' safety when they work in trenches. Aren't these Trench Safety regulations redundant?*

A: No. OSHA's regulations apply to worker safety and require the use of a "protective system" such as a trench box or shoring to protect employees working inside the trench from cave-ins of the soil walls. **The new trench regulations do not regulate worker safety, they are public safety regulations.** The Excavation
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and Trench Safety regulations at 520 CMR 14.00 regulate protections that construction companies, municipalities, state agencies, or any person that creates a trench must adhere to for the purpose of protecting the General Public. Moreover, while OSHA's regulations apply while workers are present in, at, or around the trench, the regulations at 520 CMR 14.00 apply when the trench is unattended. By definition, an "unattended trench" is one where workers are not present in or at the trench.

Q: *Can a ¾ inch thick piece of plywood be used to cover the trench?*

A: No. Pursuant to 520 CMR 14.04, "where covers are used they shall be comprised of steel metal plates no less than ¾ inches thick or equivalent.

Q: *What is considered equivalent to a ¾ inch steel plate?*

A: A cover equivalent to a steel metal plate must be able to withstand the same load as a ¾ inch steel plate.

Q: *Is there a minimum width for an excavation to be covered under the law?*

A: No. The regulations provide that the "width of the trench, as measured at the bottom, is no greater than 15 feet," however, there is no minimum width. See 520 CMR 14.02.

Q: *Are homeowners or individuals excavating a trench on their own property required to obtain a trench permit?*

A: Yes. Pursuant to Chapter 82A, Section 2, "no person shall, except in an emergency, contract for the making of or make a trench, in any public way, public property, or privately owned land until a permit is obtained from the appropriately designated person within the city, town, or public agency that is authorized to issue the permit." Therefore, trenches constructed on private property do require a trench permit.

Q: *Are homeowners or individuals using hoisting machinery to excavate on their own property required to obtain a hoisting license?*

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Protection starts here



and here.

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A: Yes. The hoisting machinery regulations require individuals renting hoisting machinery to obtain a temporary license from the rental company, receive one (1) hour of training from the company and allow a fourteen (14) consecutive day rental period. See 520 6.05(11). Therefore, homeowners using hoisting machinery must obtain a **temporary** hoisting license as well as a trench permit for the construction of a trench.

Q: *How do I obtain a hoisting license if I am renting equipment from a rental company?*

A: Homeowners may rent hoisting machinery from a rental company for a period not to exceed fourteen (14) consecutive days. The rental company must provide one (1) hour of training for each type of equipment rented, and renters must be trained in the "proper and safe operation" of the equipment. After the training, the rental company may issue a temporary license to operate the rented equipment. See 520 CMR 6.05 (11).

Q: *How long is my temporary hoisting license valid?*

A: The temporary license and rental of equipment cannot exceed 14 days. See 520 CMR 6.05 (11).



Q: *I have heard there is an exemption for building foundations, is that correct?*

A: For the "trench" created between a foundation wall and a soil wall, you do not need a trench permit because you have not "excavated" the hole as defined by M.G.L. c. 82, § 40, instead it was created when you poured the foundation wall.

All other excavations meeting the definition of a trench, "an excavation which is narrow in relation to its length, made below the surface ground in excess of three feet below grade and the depth of which is, in general, greater than the width, but the width of the trench, as measured at the bottom, is not greater than 15 feet," are covered under the new regulation, even if they are near to or related to the building foundation. For example, excavations near a foundation to install drainage or a frost wall are covered. An excavation into which a foundation will later be poured is covered if it is less than 15' across and greater than 3' deep. In this instance, you will need a trench permit and a building permit or if your local permitting authority chooses, the two permits may be combined into one.

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Q: *Is a trench permit required for cemetery burials?*

A: No. According to the statute, **M.G.L. c. 82A, §1**, the regulations and the requirement for a permit apply to "all construction related excavations and trench safety." Cemetery burials are not "construction related" and therefore do not require a permit.

Q: *Is a trench permit required for farms?*

A: Yes, if the trench is construction related. Whenever a construction related trench is created a permit is required under **M.G.L. c. 82A, §1**. Excavations that involve the laying of pipes are construction related trenches; however, excavations such as cranberry bogs which do not have piping are not considered construction related.

Q: *What action, if any, may a permitting authority take if it finds a violation of 520 CMR 14.00?*

A: If the permitting authority or an inspector from DPS or DOS identifies a serious threat to public safety, he or she may order an immediate shutdown of the trench worksite. Conditions warranting the immediate shutdown of a trench include a fatality or serious injury to a member of the General Public; the failure to use effective protections for the General Public; the failure to obtain a permit; or any other condition that constitutes a serious threat to life, limb, or property of the General Public as determined by the permitting authority. An appeal from the immediate shutdown may be made to the permitting authority or

DPS/DOS. The appeal must be made within 10 calendar days of the shutdown. The trench worksite may not operate again until such time as the entity ordering the shutdown has re-inspected the worksite and is satisfied that protections for the General Public are in use.

Where the permitting authority determines that the threat to public safety may warrant the suspension or revocation of the trench permit, the permitting authority may convene a hearing in accordance with the **Massachusetts Administrative Procedures Act, M.G.L. c. 30A**.

In addition to a post-hearing suspension or revocation, the DPS is statutorily authorized to also assess administrative fines against an excavator. **See M.G.L. c. 82A, §1**. The Department of Public Safety sends a written notice of intent to impose administrative fines, which may be up to \$5,000.00 per violation, to the violator. The party alleged to have violated the regulations may then request a hearing. Hearings are not held prior to the assessment of a fine, but must be requested in writing and must be filed with the Department of Public Safety within 10 calendar days of receipt of the notice of violation. The failure to make a timely request for a hearing shall constitute a waiver of the right to a hearing. All hearings shall be convened by a Hearing Officer of the Department of Public Safety and shall be held in accordance with M.G.L. c. 30A.

In addition to these questions, UCANE members have submitted in writing additional questions that will be answered by Commissioner Marlin and published in an upcoming issue of Construction Outlook Magazine. ■

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