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MEMORANDUM

TO: The Commonwealth of Massachusetts Trench Permitting Authorities
FROM: Thomas G. Gatzunis, Commissioner, DPS; Laura Marlin, Commissioner, DOS
RE: Excavation and Trench Safety
DATE: April 16, 2009

Chapter 82A (“the statute”) was enacted in 2002 after the death of a four-year-old girl who fell into an unattended, open trench. The statute requires the Department of Public Safety (“DPS”) and the Division of Occupational Safety (“DOS”) to write regulations regarding “construction related excavations and trench safety.” The Excavation and Trench Safety regulations promulgated in 520 CMR 14.00 (“the regulations”) went into effect on March 1, 2009.

During the course of the implementation period, the DPS and DOS have received numerous inquires regarding the regulations, and we have tried to address the questions through the FAQ section on the DPS website (www.mass.gov/dps/trenches). In particular, questions regarding the definitions of “Excavator”, “Permit holder” and operator repeatedly arise, and there appears to be a great deal of confusion and inconsistency amongst the municipalities in applying these definitions. This Memorandum is intended to clarify these issues and also serves to notify you of Emergency Regulations amending 520 CMR 14.00 to address these and other issues which have arisen. The Emergency Regulations were filed with the Secretary of State’s Office on Thursday, April 16, 2009 and are now in effect.

I. Excavator; Permit Holder; Operator

By statute, the “excavator” is defined as follows:

any entity including, but not limited to, a person, partnership, joint venture, trust, corporation, association, public utility, company or state or local government body which performs excavation operations. See M.G.L. c. 82, § 40 [emphasis added]

522 CMR 14.02 defines the "Permit Holder" as "*the excavator who is responsible for acquiring a permit from the Permitting Authority.*"

Therefore, the "Excavator" is responsible for securing the permit and is the "Permit Holder." Please note, however, that the term "Excavator" is broadly defined by statute. Therefore, while the Excavator/Permit Holder *may* be the same person or entity as the operator, there is *no requirement* that this be so. In fact, in the vast majority of cases, the Excavator/Permit Holder and the operator will not be the same. Further, there is no requirement that the Excavator hold a hoisting license, provided that all of the operators who are operating hoisting equipment on the project are properly licensed. See M.G.L. c. 82A, § 3(4); M.G.L. c. 146, § 65 and 520 CMR 6.00.

By way of illustration, an individual digging a trench in his or her backyard may be the person making the application for the permit and therefore be the Excavator/Permit Holder. This individual may also be the operator. Please note, however that a homeowner digging a trench on his or her property must possess a valid DPS issued hoisting license except where the trench is created with hand tools or other equipment exempt from the hoisting license requirements pursuant to M.G.L. c. 146, § 65 and 520 CMR 6.00. See also M.G.L. c. 82A, § 3(4).

Conversely, a public utility company which is performing excavations in a city or town public way would most likely be the Excavator/Permit Holder who would then hire operators (who hold valid DPS issued hoisting licenses) to dig the actual trenches.

There has also been confusion over whose responsibility it is to provide the insurance required under Chapter 82A, § 2. Pursuant to section 2, it is the Excavator/Permit Holder, which may or may not be the operator, who is required to provide a certificate of insurance with general liability coverage of \$100,000 per person and \$300,000 per claim or provide evidence of self-insurance in equal amounts. See M.G.L. c. 82A, § 2.

Finally, pursuant to section 1 of G.L. c. 82A, the Excavator/Permit Holder is responsible for ensuring that the trench is not left unattended without first implementing the protections for the general public required in 520 CMR 14.04. For more complete information on all of the responsibilities of the Excavator/Permit Holder please review the entire Regulation.

II. Emergency Regulations

The DPS and the DOS have filed emergency regulations amending 520 CMR 14.00. Highlights of the changes are as follows:

- Several definitions in section 14.02 have been amended. These changes include:
 - The definition of "public agency" specifically excludes cities and towns.
 - The term "general public" has been amended to include all people not engaged in construction activities at the trench. Consequently, any person engaged in construction activities at the trench is not a member of the general public.
 - The term "unattended trench" has been amended to mean that an "unattended trench" is when all people engaged in the construction activities at the trench are not present. Therefore, the trench will be attended if any individual engaged in construction activities is present at the trench.
- A hoisting license number and the name of a competent person on the permit application are no longer required.

- 520 CMR 14.03(2)(c) was amended to clarify that trenches created on land owned or controlled by a Public Agency should be permitted by that Public Agency which owns or controls the property, and not the city or town where the trench is located.
- After a trench site has been shut down, re-inspection of the site must occur within two (2) business days of notification to the permitting authority that the repairs/corrections have been made. This change resulted from comments made to the DPS and DOS and was implemented to ensure that trench sites are promptly reopened after they are made safe. *See* 520 CMR 14.05(6).
- The regulations now incorporate the statutory requirement that gas, water, telephone and community antenna companies that pay fees for permits to excavate a public way are exempt from paying a trench permit fee for the same excavation. *See* 520 CMR 14.03(6).
- Permitting authorities are authorized to issue a single permit for multiple trenches dug during one project. *See* 520 CMR 14.03(2).
- The permit must be shown to the hoisting operator in accordance with M.G.L. c. 82A, § 3(4).
- Temporary fencing requirements have been amended by allowing openings greater than 4 inches to be protected by certain guards. *See* 520 CMR 14.04(2)(b)(5).

Attached please find a copy of the emergency regulations. Please visit the DPS website at www.mass.gov/dps or the DOS website at www.mass.gov/dos for additional information.