

NEW JERSEY BOARD OF PUBLIC UTILITIES
Proposed Amendments to the One-Call Damage Prevention System Rules
N.J.A.C. 14:2-1, 3, and 6
BPU Docket Number: AX08090838

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PUBLIC UTILITIES
BOARD OF PUBLIC UTILITIES
 Underground Facilities: One-Call Damage Prevention System

Proposed Amendments: N.J.A.C. 14:2-1.2, 3.1, 6.1 and 6.2
 Proposed Repeal and New Rules: N.J.A.C. 14:2-6.4
 Proposed New Rules: N.J.A.C. 14:2-6.2 and 6.5 through 6.10

Note: This is a courtesy copy of the proposal. The official version will be published in the New Jersey Register on December 15, 2008. Should there be any discrepancies between this courtesy copy and the official version, the official version will govern.

Authorized By: Board of Public Utilities, Jeanne M. Fox, President; Frederick F. Butler, Joseph L. Fiordaliso, Nicholas V. Asselta and Elizabeth Randall, Commissioners.

Authority: N.J.S.A. 48:2-73 et seq., and in particular N.J.S.A. 48:2-86 through 90.

Calendar Reference: See Summary below for an explanation of exception to calendar requirement.

BPU Docket Number: AX08090838

Proposal Number: PRN 2008-

Comments may be submitted through February 13, 2009, through either of the following methods:

- ? Electronically, in Microsoft WORD format, or in a format that can be easily converted to WORD, by e-mailing them to the following e-mail address: rule.comments@bpu.state.nj.us; or
- ? On paper to:
New Jersey Board of Public Utilities
Kristi Izzo, Secretary
ATTN: BPU Docket Number: AX08090838
Two Gateway Center
Newark, New Jersey 07102

The agency proposal follows:

Summary

The New Jersey Board of Public Utilities ("Board") is proposing amendments to its One-Call Damage Prevention System rules, N.J.A.C. 14:2. These rules implement the Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq., which requires the Board to establish and maintain a program for the protection of underground facilities used for the conveyance of water, forced sewage, telecommunications, cable television, electricity, oil, petroleum products, gas, optical signals, traffic control or for the transportation of a hazardous liquid subject to the Federal Hazardous Liquid Pipeline Safety Act of 1979.

The rules require an excavator, through the use of a toll-free telephone number or abbreviated dialing code 811, to provide the One-Call System, which is a single Statewide notification system, with a notice of intended excavation or demolition activities. The One-Call System operator then transmits this notice to underground

facility operators located in the area of the proposed excavation or demolition activities. An underground facility operator is then required to mark the location of that facility within three business days after receipt of the information from the One-Call System operator concerning the excavator's notice.

These rules were readopted with amendments in 2007 (see 39 N.J.R. 4422(b)). This rule proposal is intended to correct and clarify provisions relating to excavations for pest management purposes, to increase penalties for violations relating to natural gas and hazardous liquid facilities, and to streamline the one-call program enforcement procedures consistent with the enforcement procedures in the Board's natural gas pipeline rules.

The amendments regarding pest management excavations clarify and codify longstanding Board practice, which is to require that pest management excavators notify the one-call center the first time excavation is conducted, but need not do so again if the excavation is performed routinely, in the same location, by the same excavator.

The proposal includes extensive changes to the Board's procedures for handling violations of the One-Call rules. These proposed procedures will match those proposed for use under the Board's natural gas pipeline safety rules at N.J.A.C. 14:7-2. See 40 N.J.R. 40 N.J.R. 4915(a). The proposal adds a great deal of detail regarding enforcement procedures. However, most of this added detail merely describes the Board's existing procedures. Under the existing penalty system, Board staff first issues a notice of probable violation. If the alleged violator does not respond within the deadline in the NOPV, the Board may then issue an administrative order and/or assess a penalty. Only after this second Board action becomes final does the penalty become due and owing. This system requires Board staff to obtain Board approval twice for the same penalty for the same violation. Under the proposal, Board staff need seek Board approval only once. The proposal provides for the Board to assess a penalty through a staff-issued NOPV, which ultimately must be approved by the Board; or through a Board-issued administrative order and notice of civil administrative penalty assessment. Although the procedure is streamlined, in all cases the Board must approve the assessment of the penalty and the penalty amount.

Existing N.J.A.C. 14:2-6.1, which sets forth the scope of subchapter 2, is proposed for readoption with minor clarifying amendments that do not change meaning. Existing N.J.A.C. 14:2-6.1(a) and (b), which establish the basic procedure by which the Board will issue a notice of probable violation (NOPV), are proposed for deletion because these procedures are covered under much more detailed provisions at proposed N.J.A.C. 14:2-6.4.

Proposed new N.J.A.C. 14:2-6.1(a) through (c) set forth the scope of the chapter, and a brief description of the routes through which the Board may levy a penalty.

Existing N.J.A.C. 14:2-6.2(a) through (c), which provide for enforcement of the rules through an action in superior court, are proposed to be replaced by new N.J.A.C. 14:2-6.9, which contains the same substance as the deleted provisions. Existing N.J.A.C. 14:2-6.2(d) and (e) are relocated to proposed N.J.A.C. 14:2-6.2(a) and (b), which are described below. Existing N.J.A.C. 14:2-6.2(f) through (h) are recodified in the proposal as N.J.A.C. 14:2-6.1(e) through (g), and clarifying amendments are proposed.

Proposed N.J.A.C. 14:2-6.2 consolidates various existing provisions regarding penalty amounts into one new section. Proposed N.J.A.C. 14:2-6.2(a) and (b) contain provisions found at existing N.J.A.C. 14:2-6.2(d) and (e), which set forth the statutory penalty ranges. Due to recent statutory amendments, the penalty amounts in the proposal are higher than those in the existing rules. For one-call violations relating to natural gas or hazardous liquid underground facilities, this is done at proposed N.J.A.C. 14:2-6.2(b) through a cross-reference to the natural gas pipeline safety rules. For one-call violations that do not relate to natural gas or hazardous liquid underground facilities, the higher penalties are found at N.J.A.C. 14:2-6.2(b). Proposed N.J.A.C. 14:2-6.2(c) contains the standards by which the Board will calculate the amount of a civil administrative penalties within the statutory ranges, which are relocated here from existing N.J.A.C. 14:2-6.2(f). Proposed new N.J.A.C. 14:2-6.2(d) emphasizes that multiple remedies can apply to one violation.

No changes are proposed to existing N.J.A.C. 14:2-6.3, which provides that failure to notify the one-call center as required constitutes prima facie evidence of negligence.

Proposed new N.J.A.C. 14:2-6.4 establishes the procedure by which the Board will issue a notice of probable violation (NOPV). The proposal adds a great deal of detail regarding this procedure, setting forth deadlines for response and consequences of not responding. The proposal also expands the role of the NOPV, providing that the NOPV can include a penalty amount and must include an Answering Certification for the alleged violator to return, indicating whether they contest the NOPV. As mentioned above, this procedure matches that which the Board will use for violations of the natural gas pipeline safety rules.

Proposed new N.J.A.C. 14:2-6.5 sets forth the requirements for responding to the NOPV through submittal of the Answering Certification, and the option for an informal conference and settlement.

Proposed new N.J.A.C. 14:2-6.6 sets forth the procedure the Board will follow if the alleged violator fails to submit the Answering Certification included in the NOPV. In such a case, or if the alleged violator fails to attend an agreed-upon hearing or conference, the violator shall be deemed in default and staff may present the NOPV to the Board for approval as a Final Order of Penalty Assessment (FOPA). If approved, the FOPA will include a penalty determined by the Board, which shall become due and owing without further opportunity for the violator to contest the penalty.

Proposed new N.J.A.C. 14:2-6.7 provides for Board issuance of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) and allows for adjudicatory hearings. The procedure is presented in the same step-by-step fashion in which the procedure appears in the natural gas pipeline safety rules.

Proposed new N.J.A.C. 14:2-6.8 provides for an alleged violator to request and adjudicatory hearing, and procedures for the Board to grant or deny such a hearing.

Proposed new N.J.A.C. 14:2-6.9 contains the same substance as existing N.J.A.C. 14:2-6.2(a) through (c). These provisions provide for the Board to enforce the rules through an action in superior court.

Proposed new N.J.A.C. 14:2-6.10 contains provisions for criminal prosecution for violations, set forth in the one-call statute at N.J.S.A. 48:2-87.

The enforcement provisions proposed herein accomplish two goals. First, they streamline and systematize the Board's penalty and enforcement procedures, consistent with the enforcement procedures in the Board's natural gas pipeline safety rules at N.J.A.C. 14:7-2. Second, these proposed amendments implement recent statutory amendments that increase the penalties for violations of the one-call rules that relate to underground facilities carrying natural gas or hazardous liquids.

As the Board has provided a 60-day comment period on these proposed amendments, they are exempt from the rulemaking calendar requirements set forth at N.J.A.C. 1:30-3.1 and 3.2, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed amendments will have a favorable social impact in that the clarification of the pest management provisions will ensure safe excavations while retaining the maximum flexibility for pest management professionals. Similarly, the proposed amendments regarding enforcement will streamline, systematize and strengthen enforcement of the one-call rules, while providing consistency with the Board's natural gas enforcement procedures.

Economic Impact

The entities affected by the proposed amendments are underground facility operators, responsible contractors, and excavators, in particular companies that excavate for pest management purposes. The proposed amendments regarding pest management excavations will result in minimal, if any, costs to excavators because they merely clarify and codify longstanding Board practice. The proposed amendments relating to enforcement will have a positive economic impact on the Board and the regulated public in that they will systematize and streamline the assessment of penalties for violation of the chapter. This will reduce the costs of assessing penalties, and will reduce costs related to damage to underground facilities by increasing compliance with the rules.

Further, proposed N.J.A.C. 14:2-6.2(b), which increase the penalties for violations, are intended to have a negative economic impact on those who violate the chapter, and thus to act as a deterrent to violation. There is no expected economic impact on the one-call center because none of the amendments is likely to change the volume or complexity of calls to the center.

Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-22 through 24 require State agencies that adopt, readopt or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. These rules do not exceed any Federal standards. However, it should be noted that under the Federal Pipeline Safety Act, 49 U.S.C. §§60101 and 60105, certain Federal funding for the State is conditioned on the implementation of a State One-Call program. The Federal Pipeline Safety Act does not require that a state implement a One-Call program. However, if the State implements such a program and other pipeline safety programs, the Act provides funding to the State for these programs. The Board currently receives some funds under this Federal provision.

Jobs Impact

The Board anticipates that the proposed amendments will have no impact on jobs in New Jersey. The proposed amendments do not increase or decrease the number of employees that would be required by any of the entities regulated by the rules.

Agriculture Industry Impact

N.J.A.C. 14:2 has not to date had any discernible impact on the agriculture industry in New Jersey, and no such impact is anticipated as a result of the proposed amendments.

Smart Growth Impact

The Board anticipates that the proposed amendments will have no impact on either the achievement of smart growth or the implementation of the State Development and Redevelopment Plan. The State Plan is intended to "provide a coordinated, integrated and comprehensive plan for the growth, development, renewal and conservation of the State and its regions" and to "identify areas for growth, agriculture, open space conservation and other appropriate designations." N.J.S.A. 52:18A-199a. Smart growth is based on the concepts of focusing new growth into redevelopment of older urban and suburban areas, protecting existing open space, conserving natural resources, increasing transportation options and transit availability, reducing automobile traffic and dependency, stabilizing property taxes, and providing affordable housing." These rules apply uniformly Statewide and do not govern the location of underground facilities, but only the conduct of excavation or demolition in proximity to these facilities. Therefore,

the Board does not expect that these amendments will affect the location of future development, and will not impact smart growth or the State Plan.

Regulatory Flexibility Statement

The proposed amendments to N.J.A.C. 14:2 will impose some recordkeeping, reporting or other compliance requirements on small businesses. A small business, as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., is a business that has fewer than 100 employees. Although it is impossible to determine specific numbers, many of the excavators and underground facility operators governed by the rules are small businesses, as defined by the Regulatory Flexibility Act, as are most pest management companies.

The proposed amendments will continue the Board's longstanding practice of requiring pest management companies to comply with the standard notice requirements the first time they perform routine activities in a particular location. Therefore, the rules do impose some recordkeeping, reporting and other compliance requirements on small businesses. However, these requirements have been in place for many years, and in fact they give pest management companies a special advantage over other excavators, in that they need not notify the one-call center after the first excavation, assuming the same company performs the excavation in the same place on a routine basis. This benefit is provided to pest management companies in recognition of the usually minor types of excavations they generally perform, as well as their tendency to be small businesses. Further, the requirements that will apply under the proposed amendments will result in minimal costs to these companies.

The proposed new enforcement procedures will impose one new compliance requirement on small businesses that violate the rules, in that they will require submittal of an Answering Certification in response to a Notice of Probable Violation. However, the remaining enforcement changes proposed do not increase requirements but merely describe them in greater detail and reorganize existing provisions. (See detailed description in Summary, above.) The proposed streamlining and systematizing of these requirements, and making them consistent with the natural gas rules (which apply to many of the same companies that are subject to the one-call rules), may also somewhat reduce any compliance burden on those small businesses that violate the rules.

Compliance with the rules as amended will not require professional services, as the one-call program is specifically designed to be user-friendly for both excavators and underground facility operators, and Board staff conduct ongoing training and outreach to excavators and underground facility operators to ensure that the regulated community understands the rules, and to make compliance as easy as possible.

Housing Affordability Impact

The proposed amendments will have an insignificant impact on affordable housing in New Jersey because the scope of the proposal is limited solely to excavations for pest

management purposes and enforcement of existing requirements. In addition, there is an extreme unlikelihood that the proposed rule amendments would evoke a change in the average costs associated with housing, because neither pest management excavations nor Board enforcement of the one-call rules affect housing prices or the housing market.

Smart Growth Development Impact

The amendments proposed herein will have an insignificant impact on smart growth in New Jersey because the scope of the proposal is limited solely to excavations for pest management purposes and enforcement of existing requirements. In addition, there is an extreme unlikelihood that the proposed rule amendments would evoke a change in housing production within Planning areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan, because neither pest management excavations nor Board enforcement of the one-call rules affect housing construction or the housing market.

Full text of the rule proposal follows (additions are indicated in boldface **thus**; deletions are indicated in brackets [thus]):

CHAPTER 2. UNDERGROUND FACILITIES: ONE-CALL DAMAGE PREVENTION SYSTEM

SUBCHAPTER 1. SCOPE

14:2-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions that apply to this chapter can be found at N.J.A.C. 14:3-1.1.

"Act" means the Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq.

"Business day" means any day other than Saturday, Sunday, or a State recognized holiday.

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

"Emergency" means:

1. Any condition constituting a clear and present danger to life, health or property caused by the escape of any material or substance transported by means of an underground facility, or by the interruption of a vital communication or public service that requires immediate action to prevent or mitigate loss or potential loss of the communication or public service; or

2. Any condition on or affecting a transportation right-of-way or transportation facility that creates a risk to the public of potential injury or property damage.

"Excavate" or "excavation" or "demolition" means any operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means of any tools, equipment, or explosive, and includes, but is not limited to, drilling, grading, boring, milling to a depth greater than six inches, trenching, tunneling, scraping, tree and root removal, cable or pipe plowing, fence post or pile driving, and wrecking, razing, rendering, or removing any structure or mass material. This term includes utility pole removal, but does not include:

1. Routine maintenance of residential property or of a residential right-of-way, performed with non-mechanized equipment;
2. Routine use of a hand tool on a residential property or a residential right-of-way, to remove earth for the repair of a sprinkler system or to locate a property boundary marker, which does not remove earth to a depth of more than six inches;
3. Excavation or demolition that remains entirely within the flexible or rigid pavement box within a right-of-way, such that it does not disturb any material except for the pavement;
4. Tilling of soil for agricultural purposes to a depth of eighteen inches or less, on land that has received or is eligible to receive a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A 54:4-23.1 et seq.; or
5. Routine landscaping activities with mechanized equipment that are intended to cut only vegetation, including lawn edging and de-thatching [;
6. Routine maintenance of residential property for pest management purposes performed with non-mechanized equipment].

"Excavator" means any person performing excavation or demolition, including a homeowner or person performing excavation or demolition on a residential property on behalf of a homeowner.

"Hand digging" means any excavation involving non-mechanized tools or equipment, including, but not limited to, digging with shovels, picks, probe bars and manual post-hole diggers.

"Mark" means any line, arrow, curve, whiskers, flag, stake, or other symbol, placed or made as part of a markout.

"Markout" means letters, symbols and marks, as defined in this section, placed on the ground or other surface in order to show the location and characteristics of an underground facility.

"Mechanized equipment" means equipment powered by a motor, engine, or hydraulic, pneumatic or electrical device, including, but not limited to, trenchers, bulldozers, power shovels, augers, backhoes, scrapers, drills, cable and pipe plows, and other equipment

used for plowing-in cable or pipe, but does not include tools manipulated solely by human power.

“Nominal” means, in relation to the size of a pipe or other underground facility, a stake, or other object, the commonly used name of the size of the object, rather than the actual size of the object. For example, since dimensional lumber is named based on its size before drying and planing, the nominal or common-named sizes of dimensional lumber are usually expressed in terms of the nearest inch, regardless of the actual size of the lumber. Thus, a board that is 2 x 4 inches in nominal size is closer to 1 ½ inches by 3 ½ inches in actual size.

"One-Call Damage Prevention System" means the communication system established in New Jersey pursuant to N.J.S.A. 48:2-76.

“One-Call System operator” or “System operator” means the person, as defined at N.J.A.C. 14:3-1.1, that the Board has designated to operate the New Jersey One-Call Damage Prevention System. The System operator’s duties are detailed in a tariff, approved by the Board.

“One-Call incident” means any of the following, if it involves an underground facility and results from excavation or demolition:

1. Death of a person;
2. Serious disabling or incapacitating injuries to one or more persons, including employees or contractors of an excavator or underground facility operator;
3. Evacuation of a building that normally is occupied by more than twenty-five people;
4. Evacuation of a school, hospital, public transit station, or similar public building;
5. Damage to the property of others estimated at more than \$5,000;
6. Damage to the property of the underground facility operator, which materially affects electric, gas, water or wastewater service to the public;
7. Major disruption of traffic, business, media operations, transportation, or any other vital communication or public service;
8. Significant environmental impact; or
9. An event that attracts the presence of media personnel at the event, or that attracts telephone or other contact from media personnel at the time of the event; and
10. Any other occurrence similar to those at 1 through 9 above, which has a significant impact on community or public safety functions.

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

"Probe bar" means a rigid bar that is pushed through the earth in order to determine the exact location of underground facilities.

“Rented equipment” means mechanized equipment which is rented complete with its operator for use in an excavation or demolition.

“Rented equipment operator” means a person that performs excavation or demolition using rented equipment.

“Responsible contractor” means a person that takes responsibility for ensuring that excavation or demolition that is performed by a rented equipment operator complies with this chapter.

"Routine" means an activity which is conducted on a cyclical basis, such as annually or seasonally, which is unlikely to result in damage to an underground facility.

"Routine maintenance of residential property or of a right-of-way" means an activity which meets all of the following criteria:

1. Is repeated on a cyclical basis, such as annually or seasonally;
2. Is conducted on a residential property or a right-of-way;
3. Is conducted with a hand tool and without the use of mechanized equipment, as defined in this section; and
4. Is unlikely to result in damage to any underground facility.

"Site" means the specific place where the excavation or demolition is performed or is to be performed and shall be identified by street address referenced to the nearest intersecting street and sub-division name, if applicable, as well as by lot and block number, if available, and by kilometer or mile marker for railways. The boundaries of a site are determined by the excavator that will be doing the excavation or demolition.

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

"Underground facility" means any public or private personal property:

1. Which is buried, placed below ground, or submerged on a right-of-way, easement, public street, other public place or private property; and
2. Which is being used, or will be used:
 - i. For the conveyance of water, forced sewage, telecommunications, cable television, electricity, oil, petroleum products, gas, optical signals, or traffic control; or
 - ii. For the transportation of a hazardous liquid regulated pursuant to 49 U.S.C. §§60101 et seq.

This term does not include storm drains or gravity sewers. For the purpose of this definition, "personal property" means a single conduit, or multiple conduits of the same facility type within a rigid envelope such as a concrete envelope. This envelope shall be considered one facility for the purposes of these rules, except as otherwise specifically provided.

“Underground facility operator” or “operator” means a person that owns or operates, or controls the operation of, an underground facility, except that this term does not include a homeowner who owns only residential underground facilities, such as an underground lawn sprinkler system or an underground structure for a residential low-voltage lighting system.

“Whiskers” means a small sheaf of plastic fibers, bent double and fastened together at the bent end, used to create a marker that may be used in place of paint under N.J.A.C. 14:2-5.2(c).

SUBCHAPTER 3. EXCAVATORS AND RESPONSIBLE CONTRACTORS

14:2-3.1 Notice of intent to excavate - timing

(a) - (f) (No change.)

(g) A routine excavation that is undertaken for pest management purposes on residential property shall be subject to the three business day advance notice requirement at (a) above the first time the excavation is performed. However, the excavation may be performed a second and subsequent times without notice to the One-Call center, provided that all of the following requirements are met

1. The excavation is performed every time by the same excavator that provided notice to the One-Call center;
2. The excavation shall be the same type of work, shall be within the extent of work, and within the depth field set forth in the original notice to the one-call center;
3. The excavation meets the definition of “routine” at N.J.A.C. 14:2-1.2; and
4. The excavation is performed solely for pest management purposes.

SUBCHAPTER 6. VIOLATIONS, PENALTIES, ENFORCEMENT

14:2-6.1 Violations in general

~~[(a) Whenever it appears to the Board that a person has violated any provision of this chapter, or an order adopted pursuant to this chapter, the Board may issue an order:~~

- ~~1. Specifying the provision or provisions of which the person is in violation;~~
- ~~2. Citing the action which constituted the violation;~~
- ~~3. Ordering abatement of the violation; and~~
- ~~4. Giving notice to the person of the right to a hearing on the matters contained in the order.~~

~~(b) An order issued under (a) above shall be effective upon receipt, and any person to whom such order is directed shall comply with the order immediately.]~~

(a) This subchapter shall govern the Board's assessment of civil penalties for violations of this chapter and the Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq., in accordance with N.J.S.A. 48:2-86 through 89.

(b) The Board may impose a civil penalty by means of a Notice of Probable Violation (NOPV) followed by a Final Order of Penalty Assessment (FOPA); through an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA); through a Superior Court Action; or as otherwise permissible by law.

(c) This subchapter shall also govern the procedures for issuing NOPVs and AONOCAPAs, requesting an informal conference, and requesting an adjudicatory hearing on an AONOCAPA.

[(c)] (d) If statutory amendments are enacted after October 15, 2007, which authorize additional or increased penalties or remedies for violation of this chapter, the Board shall have the authority to apply such penalties or remedies upon the effective date of the statutory amendment.

[14:2-6.2 Injunction, civil penalties

(a) The Board may institute an action or proceeding in the Superior Court for injunctive and other relief for any violation of this chapter, or of an order issued pursuant to this chapter.

(b) In an action instituted under (a) above, the Board may seek one or more of the following:

1. A temporary or permanent injunction, in accordance with (c) below;
2. A civil penalty, in accordance with (d) below;
3. Assessment of the violator for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation; and/or
4. Assessment of the violator for the reasonable costs of preparing and litigating the case.

(c) If a person whose repeated failure to comply with this chapter constitutes a threat to public safety, the Board or an affected underground facility operator may institute an action in the Superior Court to enjoin the person from engaging in any further excavation or demolition within New Jersey, except under such terms and conditions as the Superior Court may prescribe to ensure public safety.

(d) An underground facility operator or an excavator, or the One-Call System operator, that violates any provision of this chapter or an order adopted pursuant thereto, shall be liable to a civil penalty not to exceed the amount set forth in N.J.S.A. 48:2-88, as amended or supplemented, except as provided at (e) below. As of October 15, 2007, N.J.S.A. 48:2-88 provided for a penalty of not less than \$1,000 and not more than \$2,500 per day for each day the violation continues, except that the maximum civil penalty may not exceed \$ 25,000 for any related series of violations.

(e) Notwithstanding any provisions of this chapter or N.J.S.A. 48:2-88 to the contrary, a person who is determined by the Board, after notice and opportunity to be heard, to have violated any provision of this chapter, the Underground Facility Protection Act, or

~~an order adopted pursuant thereto, with respect to a natural gas underground pipeline or distribution facility, or a hazardous liquid underground pipeline or distribution facility, shall be liable to a civil penalty not to exceed the amount set forth in N.J.S.A. 48:2-86, as amended or supplemented. As of October 15, 2007, N.J.S.A. 48:2-86 provided for a penalty not to exceed \$ 25,000 for each violation for each day the violation continues, except that the maximum civil penalty may not exceed \$ 500,000 for any related series of violations.]~~

~~[(f)] (e) Any civil penalty imposed pursuant to this section may be compromised by the Board. In determining the amount [of the penalty, or the amount] agreed upon in compromise, the Board shall consider the [nature, circumstances, and gravity of the violation; the degree of the violator's culpability; any history of prior violations; the prospective effect of the penalty on the ability of the violator to conduct business; any good faith effort on the part of the violator in attempting to achieve compliance; the violator's ability to pay the penalty; and other factors the Board may determine appropriate concerning a particular violator] factors set forth at N.J.A.C. 14:2-6.2(c).~~

~~(f) [(g)The amount of] Once a penalty becomes due and owing in accordance with this subchapter, the penalty [when finally determined, or the amount agreed upon in compromise,] may be deducted from any sums owing by the State to the person charged, or may be recovered, if necessary, in [a summary proceeding pursuant to] accordance with "the [penalty enforcement law] Penalty Enforcement Law of 1999" (N.J.S.A. 2A:58-[1] 10 et seq.).~~

~~[(h)] (g) Pursuit of any remedy specified in this subchapter shall not preclude the pursuit of any other remedy, including any civil remedy for damage to an operator's underground facilities or for damage to a person's property, provided by any other law. Administrative and judicial remedies provided in this section may be pursued simultaneously.~~

14:2-6.2 Penalty amounts

(a) Except as provided at (b) below, an underground facility operator, an excavator, or the One-Call System operator, that violates any provision of this chapter, the Underground Facility Protection Act, or an order adopted pursuant thereto, shall be liable to a penalty of not less than \$1,000 and not more than \$2,500 per day for each day the violation continues, except that the maximum civil penalty shall not exceed \$25,000 for any related series of violations.

(b) Notwithstanding any provision of this chapter or of N.J.S.A 48:2-88 to the contrary, a person who is determined by the Board, after notice and opportunity to be heard, to have violated any provision of this chapter, the Underground Facility Protection Act, or an order adopted pursuant thereto, with respect to a natural gas underground pipeline or distribution facility, or a hazardous liquid underground pipeline or distribution facility, shall be liable to a civil penalty in the amount set forth in the Board's natural gas pipeline safety rules at N.J.A.C. 14:7-2.6.

(c) In determining the amount of the penalty assessed, or an amount agreed upon in compromise, the Board shall consider:

1. The nature, circumstances and gravity of the violation(s);
2. The degree of the violator's culpability;
3. Any history of prior violations;
4. The prospective effect of the penalty upon the ability of the violator to conduct business;
5. Any good faith effort by the violator to achieve compliance;
6. The violator's ability to pay the penalty; and
7. Any other factors justice may require.

(d) Neither the assessment of a penalty nor the payment of a penalty shall be deemed to affect the availability of any other enforcement provision provided for by law, in connection with the violation for which the assessment is levied or any other violation.

[14:2-6.4 Civil penalties to the State

All civil penalties recovered pursuant to this chapter shall be paid into the General Fund.]

14:2-6.4 Notices of probable violation

(a) Upon discovery of a probable violation, Board staff may issue a written Notice of Probable Violation to the alleged violator. The NOPV shall be served in accordance with the New Jersey Office of Administrative Law's procedural rules at N.J.A.C. 1:1-7.

(b) The Notice of Probable Violation shall:

1. State the facts which constitute the probable violation;
2. Identify the provision of law, rule, regulation or order violated;
3. Identify the maximum permissible penalty for the violation;
4. Include a form of Answering Certification, to be completed and submitted by the alleged violator;
5. Notify the alleged violator of both of the following:
 - i. Failure of the alleged violator to submit the Answering Certification within the deadline in N.J.A.C. 14:2-6.5(a) may result in Board findings as to the violation(s) in the NOPV through issuance of a Final Order of Penalty Assessment (FOPA), which may include the maximum penalty permissible by law, without further prior notice to the alleged violator; and
 - ii. The alleged violator may contest the NOPV in accordance with N.J.A.C. 14:2-6.5(b). If an alleged violator contests the NOPV, the Board may issue an Administrative Order and Notice of Civil Administrative Penalty Assessment in accordance with N.J.A.C. 14:2-6.7, in which case the alleged violator may request a hearing in accordance with N.J.A.C. 14:2-6.8.

(c) The Notice of Probable Violation may include an offer of settlement or compromise.

(d) The Board or its staff may withdraw a Notice of Probable Violation at any time.

14:2-6.5 [(Reserved)] Response by alleged violator to Notice of Probable Violation

(a) The alleged violator shall respond to the Notice of Probable Violation by submitting the completed Answering Certification to the Board's Division of Reliability and Security within 21 calendar days after receiving the Notice of Probable Violation and form of Answering Certification. The alleged violator shall submit the Answering Certification regardless of whether the alleged violator wishes to contest the NOPV.

(b) If the alleged violator wishes to contest the NOPV, the alleged violator shall indicate this on the Answering Certification. Board staff may hold an informal conference with the alleged violator.

(c) Following the alleged violator's submittal of the Answering Certification, the Notice of Probable Violation may be resolved informally; and/or the staff and the alleged violator may enter into a written settlement agreement, which shall be presented to the Board for approval.

(d) Nothing in this section or in N.J.A.C. 14:2-6.4 shall prevent the Board from issuing an Administrative Order and Notice of Civil Administrative Penalty Assessment pursuant to this subchapter at any time upon discovery of a probable violation, nor shall this section be deemed to affect the availability of any other enforcement provision provided for by law, in connection with the probable violation.

(e) If the NOPV is not resolved informally under this section, Board staff may present the matter to the Board for further action as determined by the Board, which may include, but shall not be limited to, the issuance of an AONOCAPA.

14:2-6.6 Failure of alleged violator to submit Answering Certification

(a) If the alleged violator fails to submit the Answering Certification within the deadline at N.J.A.C. 14:2-6.5(a), or fails to attend a hearing or conference as required under this subchapter, the alleged violator shall be deemed in default.

(b) If an alleged violator is in default, Board staff may present the NOPV to the Board for findings and issuance of a Final Order of Penalty Assessment (FOPA), without further notice to the alleged violator. Board Staff shall also present proof that the NOPV was served upon the violator in accordance with the Administrative Procedure Rules at N.J.A.C. 1:1-7.2.

(c) If the Board issues a FOPA including one or more violations that were set forth in the NOPV, the Board may assess the maximum penalty authorized by law for these

violations without further prior notice to the violator and without further opportunity for the violator to contest the penalty.

(d) In determining the appropriate amount of a civil administrative penalty after a default, the Board shall not be bound by any compromise or settlement offer made to the alleged violator by staff, and shall apply the standards in N.J.A.C. 14:2-6.2.

(e) Payment of a civil administrative penalty assessed under this section is due on the tenth day following service upon the alleged violator of the Board's FOPA or as otherwise specified by the Board.

14:2-6.7 Notice of Administrative Order and Civil Administrative Penalty Assessment (AONOCAPA)

(a) In addition to the Notice of Probable Violation which can be issued by Board staff under N.J.A.C. 14:2-6.4, the Board may at any time issue an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA).

(b) The Board shall serve an AONOCAPA in accordance with the Administrative Procedure Rules at N.J.A.C. 1:1-7.2.

(c) The Board may, in its discretion, assess a civil penalty for more than one offense in a single Administrative Order and Notice of Civil Administrative Penalty Assessment or in multiple Administrative Orders and Notices of Civil Administrative Penalty Assessment.

(d) An Administrative Order and Notice of Civil Administrative Penalty Assessment shall:

1. Identify the provision of the law, rule, regulation or order alleged to have been violated;
2. Concisely state the facts which constitute the alleged violation;
3. Order such alleged violation to cease;
4. Specify the amount of the civil administrative penalty to be imposed; and
5. Notify the alleged violator of the right to request an adjudicatory hearing pursuant to the procedures in N.J.A.C. 14:2-6.8. If no hearing is requested, the penalty set forth in the AONOCAPA will be due and owing on the 21st day following service on the alleged violator, without further notice.

(e) If no hearing is requested on an AONOCAPA pursuant to N.J.A.C. 14:2-6.8, an Administrative Order and Notice of Civil Administrative Penalty Assessment shall become a Final Order, and the penalty in the AONOCAPA shall become due and owing, on the 21st day following service of the Administrative Order and Notice of Civil Administrative Penalty Assessment on the violator.

(f) If a hearing is requested but the Board denies the hearing request pursuant to N.J.A.C. 14:2-6.8, an Administrative Order and Notice of Civil Administrative Penalty Assessment shall become a Final Order, and the penalty in the AONOCAPA shall

become due and owing, upon service on the violator of notice of the hearing request denial.

(g) If an adjudicatory hearing is requested and conducted, an Administrative Order and Notice of Civil Administrative Penalty Assessment shall become a Final Order upon service on the violator of a Final Order in the contested case.

14:2-6.8 Adjudicatory hearings

(a) To request an adjudicatory hearing to contest an Administrative Order and Notice of Civil Administrative Penalty Assessment issued pursuant to this subchapter, the alleged violator shall submit the following information in writing to the Secretary of the Board, Attention: Adjudicatory Hearing Request/One-Call, Board of Public Utilities, Two Gateway Center, Newark, New Jersey 07102:

1. The name, address and telephone number of the alleged violator and its authorized representative;
2. The alleged violator's defenses, stated in short and plain terms, to each of the Board's preliminary findings of fact contained in the Administrative Order and Notice of Civil Administrative Penalty Assessment;
3. An admission or denial of each of the Board's preliminary findings of fact contained in the Administrative Order and Notice of Civil Administrative Penalty Assessment. If the alleged violator is without knowledge or information sufficient to form a belief as to the truth of a finding, the alleged violator shall so state and this shall have the effect of a denial. A denial shall fairly meet the substance of the findings denied. When the alleged violator intends, in good faith, to deny only a part of or qualify a finding, the alleged violator shall specify so much of it as true and material and deny only the remainder. The alleged violator may not generally deny all of the findings but shall make all denials as specific denials of designated findings. For each finding denied, the alleged violator shall allege the fact or facts as the alleged violator believes it or them to be;
4. Information supporting the request and specific reference to or copies of other written documents relied upon to support the request;
5. An estimate of the time required for the hearing (in days and/or hours); and
6. A request, if necessary, for a barrier-free hearing location to accommodate physically disabled persons.

(b) If the Board does not receive the hearing request within 20 days after service on the violator of the Administrative Order and Notice of Civil Administrative Penalty Assessment being challenged, the Board shall deny the hearing request.

(c) If the alleged violator fails to include all the information required by (a) above or if upon review of the submission, the Board determines that there is no dispute of material facts, the Board may deny the hearing request.

(d) All adjudicatory hearings shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rule, N.J.A.C. 1:1.

14:2-6.9 Actions in Superior Court

(a) The Board may institute an action or proceeding in the Superior Court for a violation of any provision of this chapter, the Underground Facility Protection Act, or an order adopted pursuant thereto and the court may proceed in a summary manner.

(b) The Board may bring a Superior Court action for one or more of the following remedies:

1. A temporary or permanent injunction, pursuant to 48:2-86(b);
2. A civil penalty;
3. Costs incurred by the Board as a result of any investigation, inspection, monitoring or survey that led to the Board's determination that the violation had occurred; and/or
4. The reasonable costs of preparing, pursuing and litigating the case against the violator.

(c) An affected underground facility operator may institute an action in the Superior Court for an injunction against a violator whose repeated failure to comply with the Underground Facilities Protection Act constitutes a threat to public safety.

(d) The institution of an action or proceeding in Superior Court by any party shall not limit the Board's authority to seek the administrative remedies provided for in this subchapter.

14:2-6.10 Criminal prosecution

A person that knowingly engages in certain activities in violation of this chapter may be subject to criminal prosecution in accordance with N.J.S.A. 48:2-87.