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# NEW JERSEY BOARD OF PUBLIC UTILITIES

## Adopted Amendments to the One-Call Damage Prevention System Rules

N.J.A.C. 14:2-1, 3, and 6

BPU Docket Number: AX08090838

Adopted August 17, 2009

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### PUBLIC UTILITIES

#### BOARD OF PUBLIC UTILITIES

##### Underground Facilities: One-Call Damage Prevention System

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

Proposed: December 15, 2008, at 40 N.J.R. 6928(a).

Adopted: July 1, 2009, by the Board of Public Utilities, Jeanne M. Fox, President; Frederick F. Butler, Joseph L. Fiordaliso, Nicholas Asselta and Elizabeth Randall, Commissioners.

Filed: July , 2009, as R. 2009 d.\_\_\_\_, with changes not requiring additional public notice or comments.

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

BPU Docket Number: AX08090838

Effective Date: August 17, 2009

Expiration Date: August 23, 2012

The New Jersey Board of Public Utilities (Board) is herein adopting 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.

The amendments correct and clarify provisions relating to excavations for pest management purposes, increase penalties for violations relating to natural gas and hazardous liquid facilities, and streamline the one-call program enforcement procedures consistent with the enforcement procedures in the Board's natural gas pipeline safety rules at N.J.A.C. 14:7-2.

The amendments adopted herein were proposed on December 15, 2008, and comments were accepted through February 13, 2009.

### **Summary of Public Comments and Agency Responses:**

The following commenters submitted timely comments on the proposal:

1. Karen D. Alexander, New Jersey Utilities Association (NJUA); and
2. Sheree L. Kelly - Public Service Electric and Gas Company (PSE&G); Mary Patricia Keefe - Pivotal Utility Holdings Inc. d/b/a/ Elizabethtown Gas; Tracey Thayer - New Jersey Natural Gas Company; and John Stanziola - South Jersey Gas Company. Collectively: Gas Distribution Companies (GDCs).

### **General Comments**

1. **COMMENT:** We continue to fully support the basic principles of ensuring the continued protection of underground facilities, safety and damage prevention, underlying the proposed rules. For the most part the proposed rules accomplish these objectives. Further, we appreciate the effort demonstrated by the Bureau of Reliability and Security staff (Board Staff) in its preparation of the rule adoption document. (GDCs)

**RESPONSE:** The Board appreciates this comment in support of its rulemaking efforts.

2. **COMMENT:** We suggest that limits be placed on the pest management excavations to avoid abuse. We offer the following alternative to N.J.A.C. 14:2-3.1: "However, the excavation may be performed a second and subsequent time without notice to the One-Call center, **for two years from the date of the initial request**

provided that all of the following requirements are met:

1. The excavation **must be** {is} performed every time by the same excavator, **meaning the same person must perform or supervise the first and all subsequent excavations.** [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;
4. The excavation is performed solely for pest management purposes; and
5. **The pest management representative shall identify all locations of the proposed excavation by white lining.**

(See Common Ground Alliance (CGA) Best Practices 5-2.) (GDCs)

**RESPONSE:** The commenter’s suggested two year limit would reduce the usefulness of the provision and the streamlining intended by the Board in proposing the provision, as the proposed amendment applies to work performed cyclically on an annual or seasonal basis. The Board will continue to monitor the application of this rule to determine if subsequent amendments are necessary. Furthermore, if a gas distribution company is concerned about gas line relocations, it may notify a pest management company of newly installed or moved lines. The gas company will have the contact information for the pest management company from the notice required for the first excavation performed on the site. Regarding the commenter’s suggestion that white lining be required in all cases, this requirement is addressed at N.J.A.C. 14:2-3.2(c) and a special requirement is not necessary for this rule provision. The Board encourages white lining but does not mandate it. (See N.J.A.C. 14:2-3.2(c)) In the case of pest management excavations, the lining would have to remain on the ground for an extended period. It is unlikely that homeowners would accept permanent lines on their property, and lining is unlikely to last on the soil and plant material that is typical in areas where pest management activities typically occur.

## **SUBCHAPTER 6. VIOLATIONS, PENALTIES, ENFORCEMENT**

3. **COMMENT:** We suggest that the rules include the following: “All Civil Penalty procedures shall commence within 12 months of the Board’s determination that a violation has occurred.” This is appropriate in light of the prompt reporting requirements and will encourage fairness in the process. (GDCs)

**RESPONSE:** The Board believes that the rules as proposed and adopted provide for a fair penalty assessment process. The Board has historically implemented similar provisions without the suggested 12-month limit and has not found that unfairness has resulted. Furthermore, the default New Jersey statute of limitations on enforcement actions such as these is ten years (see N.J.S.A. 2A:14-1.2).

4. **COMMENT:** We suggest that Board Staff incorporate the penalty provisions of the Common Ground Alliance Best Practices 2008. Specifically, the penalty system that includes education as an alternative or supplement to civil penalties. (GDCs)

**RESPONSE:** The Board agrees with the commenter that education is an important supplement to enforcement action. Therefore, the Board conducts and

participates in many training and education courses, seminars, and other opportunities for the regulated community to learn about the requirements of the one-call rules. In addition, Board staff and the one-call center operator answer thousands of questions by telephone and e-mail in order to assist the public in complying with the rules. While the Board believes that education and training are essential, they must be used in conjunction with and not in place of regulatory enforcement, including civil penalties. Furthermore, the One-Call Statute sets forth penalties as a necessary and important component of the one-call program. See N.J.S.A. 48:2-86. The Board's authority to compromise penalties is set forth in N.J.S.A. 48:2-86 and further delineated at N.J.A.C. 14:2-6.2(c).

5. **COMMENT:** We suggest that Board Staff incorporate the penalty provisions of the Common Ground Alliance Best Practices 2008. Specifically, the penalty system should use a tiered structure to distinguish violations by the level of severity or repeat offenses (e.g., warning letters, mandatory education, civil penalty amounts). (GDCs)

**RESPONSE:** Board staff has always taken a variety of actions to try to resolve suspected violations prior to assessing penalties, including informal contacts with parties through telephone calls, e-mails, letters and site visits. The course followed in each particular case varies widely because the types of violations and types of parties involved vary widely. Setting forth a mandatory progression for these informal, pre-penalty actions would prevent staff from reacting appropriately to varied and constantly changing situations as the resolution of each violation proceeds. Therefore, the commenters' suggested change has not been made.

6. **COMMENT:** We suggest that Board Staff incorporate the penalty provisions of the Common Ground Alliance Best Practices 2008. Specifically, the penalty system should establish mitigating and aggravating factors. (GDCs)

**RESPONSE:** The rules, as proposed and adopted, include a list of aggravating and mitigating factors used in calculating a penalty within the statutory range. See N.J.A.C. 14:2-6.2(c).

7. **COMMENT:** We suggest that Board Staff incorporate the penalty provisions of the Common Ground Alliance Best Practices 2008. Specifically, the penalty system should not allow any violator or class of violators to be shielded from the consequences of a violation. (GDCs)

**RESPONSE:** It is not clear in what way the commenters believe the rules authorize the Board to shield a particular violator or class of violators from the consequences of a violation. Furthermore, the Board has always made every effort to apply penalties, and all regulatory provisions, in a fair and appropriate manner, and intends to continue to do so. Please also see responses to Comments 5 and 6.

8. **COMMENT:** The rules state that "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)." However, proposed N.J.A.C. 14:2-6.2(b) states that "[n]otwithstanding any provision of this chapter of N.J.S.A. 48:2-88 to the contrary,

a person who is determined by the Board . . .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" . We seek clarification as to what the "higher penalties" would be for One-Call violations not related to natural gas or hazardous liquid underground facilities. Further, if the Board is to apply the higher penalties to One-Call violations that are not related to natural gas or hazardous liquid underground facilities, we respectfully request that the Board reconsider, as the proposed penalties would be grossly disproportionate to the violations to which they would be applied. One-Call violations related to underground water or telecommunications facilities, for example, do not carry the same risks and dangers as those posed by some of the other underground facilities subject to the rules. (NJUA)

**RESPONSE:** The commenter quotes from the explanatory summary of the proposed amendments, which contains an erroneous cross-reference. The penalties for all one-call violations, except those relating to natural gas or hazardous liquids, are covered at N.J.A.C. 14:2-6.2(a). These penalties (\$1,000 to \$2,500 per day up to a maximum of \$25,000) are established by statute at N.J.S.A. 48:2-88 and have not changed from the previously effective penalties. As such, no change to the rule text is necessary.

9. **COMMENT:** Proposed N.J.A.C. 14:2-6.1(c) states that "This subchapter shall also govern the procedures for issuing NOPVs and AONOCAPAs, requesting an informal conference and requesting an adjudicatory hearing on an AONOCAPA." However, the procedures for requesting an informal conference are not clear. Specifically, the timing and protocol to request an informal conference are absent. Please clarify when an informal conference may be requested and the procedures that would be used by an alleged violator to request one. We request that the Board consider allowing an alleged violator to request an informal conference with Board staff within its Answering Certification (See N.J.A.C. 14:2-6.5). (NJUA)

**RESPONSE:** This is addressed at N.J.A.C. 14:2-6.5(b) which, as proposed and adopted, provides for the alleged violator to respond to the NOPV through the Answering Certification, and also provides that Board staff may hold an informal conference with the alleged violator at that time. As all alleged violators must file an Answering Certification, an alleged violator cannot request an informal conference in lieu of filing the Answering Certification. However, An alleged violator may request an informal conference or otherwise seek to informally resolve an NOPV at any time after filing an Answering Certification. An informal conference may be requested through any practical means. A determination of whether a settlement offer, an informal conference, or other consideration is appropriate will be made by Board Staff on a case by case basis. Any request to informally resolve an NOPV will not preclude the Board from filing a FOPA or AONOCAPA in accordance with the rules.

10. **COMMENT:** Proposed N.J.A.C. 14:2-6.2(c)6 calls for the Board to review a

violator's ability to pay in setting the amount of a civil administrative penalty within the statutory range. This may lead to a disproportionate number of penalties being assessed against gas distribution companies, without due consideration to other factors. This is especially relevant to gas pipeline operators since the penalty limits for gas pipeline operators exceed limits for other violations by a factor of forty. The CGA Best Practices call for equitably administering such assessments. This inequity will ultimately be shouldered by the natural gas customers throughout the state. We suggest the deletion of N.J.A.C. 14:2-6.2(c)6, and the addition of a provision stating that gas pipeline operators will be subject to the provisions of N.J.A.C. 14:2-6.2(b) equitably and under equal criteria as other stakeholders. (GDCs)

**RESPONSE:** It is not clear why the commenters believe that the application of the cited provision will result in “a disproportionate number of penalties being assessed against gas distribution companies, without due consideration to other factors.” The provision applies equally to all companies, not just gas distribution companies. Furthermore, the provision was moved without substantive change from the previously effective rules at N.J.A.C. 14:2-6.2(f), and it is specifically set forth in the Underground Facility Protection Act at N.J.S.A. 48:2-86(c) and in the Board’s Pipeline Safety Rules at N.J.A.C. 14:7-2.6(b)6. Therefore, the commenters’ suggested change has not been made. As to the cost of penalties being borne by ratepayers, the Board notes that a determination of whether it is appropriate to include a particular expense in rate base can be made only by the Board in an appropriate rate proceeding.

- 11. COMMENT:** A provision requiring that civil penalties go to the State was deleted in the proposal (previously found at N.J.A.C. 14:2-6.4). We seek clarification as to where penalties will be deposited. Penalty amounts collected should be utilized to improve the one-call system and public awareness of the important safety aspects related to this program. A separate fund should be created and a third party designated for oversight, with the funds being utilized for damage prevention training or other related program activities. (GDCs) (NJUA)

**RESPONSE:** The removal of this provision was not intended to change the manner in which these payments are applied, which is set not by these rules but by Department of Treasury policy. The deletion was merely intended to remove an unnecessary provision. As such, and to avoid any confusion, the proposed deletion has not been adopted, the provision has been retained in the adopted rules, and has been recodified as N.J.A.C. 14:2-6.2(e).

- 12. COMMENT:** N.J.A.C. 14:2-6.5 requires an alleged violator to respond to an NOPV by submitting the completed Answering Certification within 21 calendar days or be deemed in default. The time requirement under this provision is exceptionally limited and the consequences for untimely reply are extreme. We continue to work closely with Board Staff to resolve alleged violations. Issuance of a FOPA without further notice may deny us the opportunity to remedy what is likely to be an administrative oversight. Given that failure to file the certification in a timely manner will result in a Final Order of Penalty Assessment (“FOPA”) without further notice to

the alleged violator, the time to file the certification should be at least thirty days, it should be permissible to file the certification electronically, a second written notice should be provided to an alternate contact, and additional verbal or electronic notice should be sent to a designated representative if the certification is not filed. These changes will ensure that due process is accomplished. (GDCs)

**RESPONSE:** The Board believes that the rules provide sufficient due process protections. The deadline as proposed and adopted provides sufficient time to submit a complete Answering Certification. The purpose of the certification is to provide the Board with a written response to the NOPV. Under the previous natural gas pipeline safety rules at N.J.A.C. 14:7-2.3(b), an alleged violator was required to respond to an NOPV within fourteen business days, which is roughly equivalent to 21 calendar days. This has not proved to be a problem in the past.

- 13. COMMENT:** N.J.A.C. 14:2-6.4 through 6.6: Under the existing penalty system, Board Staff first issues a notice of probable violation (NOPV). 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 provides ample due process to an alleged violator. Under the proposed rule Board Staff will need to seek Board approval only once, as the amendments provide for the Board to assess a penalty through a staff-issued NOPV or through a Board-issued administrative order and notice of civil administrative penalty assessment. (GDCs)

**RESPONSE:** This proposal amends the current civil penalty procedure to establish additional procedural safeguards and encourage fairness consistent with the enforcement procedures previously adopted in the Board's natural gas pipeline safety rules at N.J.A.C. 14:7-2. These rules require that certain information is included in NOPV, so as to alert alleged violators of these procedural safeguards. It is unclear why the commenters believe that the prior rules required two Board actions. Under the rules as adopted, as in the previously effective rules, if an alleged violator fails to respond to a NOPV, the Board may adopt the NOPV and issue a final order assessing penalties.

- 14. COMMENT:** N.J.A.C. 14:2-6.7(e) requires an alleged violator to submit a hearing request within 20 days after service of the AONOCAPA. The time requirement under this provision is exceptionally limited and the consequences for untimely reply are extreme. If the request for hearing is not timely filed, the AONOCAPA becomes a Final Order, and the penalty in the AONOCAPA becomes due and owing on the 21st day following service of the AONOCAPA on the violator. Given the consequences, the time to request a hearing should be at least thirty days. (GDCs) (NJUA)

**RESPONSE:** The Board believes that the rules provide sufficient time to submit a hearing request. This requirement is consistent with the Board's natural gas pipeline safety rules which were recently readopted in relevant part at N.J.A.C. 14:7-2.6(b). This time period has not proved to be a problem in the past.

- 15. COMMENT:** N.J.A.C. 14:2-6.8(c) – What standard will the Board use to

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determine whether there is a dispute of material facts when deciding whether to deny a hearing request? (GDCs)

**RESPONSE:** A determination of whether a dispute of material facts exists is made on a case-by-case in consideration of applicable statutes, rules, orders and other precedent

### **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.

**Full text** of the adoption follows: (additions are indicated in boldface with asterisks **\*thus\***; deletions are indicated in brackets with asterisks **\*[thus]\***):

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

### **SUBCHAPTER 6. VIOLATIONS, PENALTIES, ENFORCEMENT**

#### **14:2-6.2 Penalty amounts**

(a) - (d) (No change from proposal.)

**\*(e) All civil penalties recovered pursuant to this chapter shall be paid into the General Fund.\***