



Municipal Client Advisory
February 2008

**IMPACT OF NEW STATE EXCAVATION
AND TRENCH SAFETY LAW UPON MUNICIPALITIES**

The new trench safety law, contained at M.G.L. c. 82A, § 1 et seq. and 520 CMR 14.00, imposes certain responsibilities upon municipalities with respect to the issuance of permits to “excavators” for the excavation of certain “trenches.” The trench safety regulations will be effective on **January 1, 2009**.

For municipalities, the significant provisions of the trench safety law are as follows:

- The trench safety law is triggered when any “trench” is excavated on public or private land, and on public ways. As defined, a “trench” is restricted to “an excavation which is narrow in relation to its length, made below the surface ground in excess of 3 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 no greater than 15 feet.” M.G.L. c. 82A, § 4; 520 CMR 14.02. An excavation solely made for a building foundation is not subject to the trench safety law, although some excavations will require both a trench and a building permit (e.g. a trench excavation for a septic system).
- A municipality must designate a board or officer as the permit-granting authority. This designation may occur via a town meeting warrant article, ordinance, or by-law, as applicable. The board or officer so designated becomes the municipal permitting authority (“MPA”) for these purposes. The designation of the MPA should occur during calendar year 2008, to ensure compliance with the January 1, 2009 effective date of the trench safety regulations. Sample warrant articles for the designation of an MPA are attached as Appendix A to this advisory.
- Only the Department of Public Safety can assess a monetary penalty for violations of the trench safety law. Nevertheless, a municipality may establish a reasonable fee for the administrative costs to review and process trench permits. Gas companies and corporations subject to the provisions of Massachusetts General Laws Chapters 165, 166 and 166A that have already paid a fee for a permit to excavate a public way are not required to pay an additional fee for the same excavation.



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- An excavator must obtain a permit from the designated municipal permitting authority before making a trench excavation, unless there is an emergency. An “excavator” includes public and private entities and therefore a municipality is subject to the same standards of permitting and safety protections as other excavators.
- The trench safety law provides a minimum content for the permit application. The trench permit application may be included with the street opening permit application. Upon issuance, the permit must be posted within plain view of the trench, such as the cab of hoisting equipment or construction trailer window.
- The trench permit applicant must: (1) complete an application; (2) 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 such amounts; and (3) pay the required application fee. There are special notice requirements if a permit is issued for a trench on property in which a municipality owns, controls or maintains an interest.
- Access to an unattended trench must be restricted by a cover or barrier, or the work site may be backfilled. Specific cover and barrier requirements depend upon the location of a trench on a public way or at a fixed worksite. Alternatively, the trench may be continuously monitored in person by either the permit holder or person(s) under the control and direction of the permit holder. A municipality may require additional, site-specific requirements to protect the public as a condition to a trench permit.
- The MPA, Department of Public Safety (“DPS”), and Division of Occupational Safety (“DOS”) share jurisdiction to enforce the trench safety law.
- If the MPA or a DPS or DOS inspector determines that there is a threat to public safety, it may order remedial action and an immediate shutdown of the trench site until such condition is satisfactorily corrected. A trench must remain closed until all required repairs and corrections are satisfactorily completed. Any person aggrieved by a shutdown of a trench site may appeal for a hearing to the entity that order such shutdown, with a further appeal available in superior court.



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- The MPA has discretion to establish grounds for a permit revocation or suspension and it may revoke or suspend a permit after hearing. A permitting authority cannot suspend or revoke a permit exclusively based on worker-related OSHA violations.
- A municipality may enact a more stringent by-law or ordinance than the trench safety law, such as requirements for inspections and police details. Notably, the trench safety law does not require inspections.

Please feel free to contact the attorneys at Murphy, Hesse, Toomey & Lehane, LLP if you have any specific questions regarding the new trench safety law.



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APPENDIX A

Sample Town Meeting Warrant Article – Explicit Designation of the Municipal Permitting Authority:

To see if the Town will, pursuant to M.G.L. c. 82A, § 2, vote to designate the _____ (identify Municipal Permitting Authority) as the Town's _____ (officer or board) to issue permits for the purpose of creating a “trench” as that term is defined by M.G.L. c 82A, § 4 and 520 CMR 14.00, or to take any action in the matter.

Sample Town Meeting Warrant Article – Delegation of Designation of the Municipal Permitting Authority to Selectmen:

To see if the Town will, pursuant to M.G.L. c. 82A, § 2, vote to authorize and designate the Selectmen to designate the Board or Officer to issue permits for the purpose of creating a “trench” as that term is defined by M.G.L. .c. 82A, § 4 and 520 CMR 14.00, or to take any action in the matter.