**House Bill 3388, An Act Relative to Improving Public Safety in Excavation**

SECTION BY SECTION SUMMARY

**SECTION 1. Inserting Definitions for the Terms “Marking Standards” and “Non-Mechanical Means”.**

LANGUAGE:

Section 40 of Chapter 82 of the general laws, as appearing in the 2014 Official Edition, is amended by inserting the following terms therein:-

“Marking standards”, the methods by which a company designates its facilities in accordance with standards established by the Common Ground Alliance (CGA) and the American Public Works Association.

“Non-mechanical means”, shall mean excavation using any device or tool manipulated by human power, including air vacuum, air blowing or similar methods of excavation designed to minimize direct contact with utilities.

RATIONALE:

The addition of the term “Marking Standards” refers to a term that is referenced in the next section of the legislation. In short, it derives from the view that Dig-Safe markings are sometime inconsistent in their application. The legislation contemplates that utility companies, marking companies and excavators will begin to audit their own standards of marking to ensure that they are in accordance with those recommended by the Common Ground Alliance and the American Public Works Association, two leading authorities on the marking of utilities.

The addition of the definition “non-mechanical means” reflects the technological change that has occurred since the creation of the Dig-Safe law. Of note, “non-mechanical as currently used refers to an individual with a shovel or other tool, manually digging or clearing earth within a marked zone. As technology has advanced, excavators can use vacuums and blowers to more safely clear soil or debris in the safety zone than an individual utilizing a shovel or other similar tool. This proposal simply amends the existing law to reflect the newer forms of technology which may, in fact, cause less direct contact with a utility.

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**SECTION 1. Inserting language to ensure certain municipal departments, with significant underground infrastructure, remain protected.**

LANGUAGE:

SECTION 2. Section 40 of Chapter 82 of the general laws, as appearing in the 2014 Official Edition, is further amended after the words “cable television company, and”, in line 5, by inserting the following words:- “municipal departments responsible for street lights or traffic signals,”.

RATIONALE:
Municipal departments responsible for street lights or traffic signalization, rely on underground wires or cables to power this infrastructure. Under the current Dig-Safe law, third party locators are not able to identify where the power lines for this infrastructure is. Accordingly, while a contractor may excavate a portion of earth, properly and otherwise marked in accordance with Mass. Gen. Laws ch. 82, the contractor may still unearth these street light and traffic signal power lines.

This addition to the legislation would require the municipal department with oversight of their street lighting or traffic signals to identify where such power lines are located. By doing so, cities and towns will save significant funds and reduce traffic delays related to the repair and/or maintenance of underground infrastructure damaged as a result of not being marked. While many municipalities voluntarily identify the location of these utilities, some do not assist with the locating of these important underground items.

**SECTION 2. Inserting language to better identify underground utilities and ensure consistency and quality of utility location marking.**

LANGUAGE:

Section 40B of Chapter 82 of the general laws, as appearing in the 2014 Official Edition, is amended by inserting the following sentences at the end thereof:-

At a minimum, all markings shall indicate, where practicable, the width if it is greater than two inches, the material of the underground facility, the existence of multiple ducts, as well as any change in direction and any terminus points of the facility. In circumstances where the total number of lines buried in the same trench may not be readily known, a corridor marker may be used.

A company shall conduct periodic audits to ensure the accuracy of the locating and marking of facilities as well as its adherence to marking standards.

RATIONALE:

With the advancement of technology and digital recordkeeping, it is possible to determine, in some cases, whether the width of an underground utility is greater than two inches, the actual material of the underground facility and whether multiple ducts exist. While the vast majority of the language reflects language already in 220 CMR 99.05, the additional language simply refers to the material of a facility and the existence of multiple ducts. As it applies in the regulations, the designation of such markings shall only occur “if practicable”. It does not mean that a locator or other marking entity will somehow be held liable if it is not practicable to know these additional characteristics. (Note: an excavator who knows these additional factors can better plan an excavation and, ideally, further reduce the risk of a utility strike.)

The final sentence of the proposed amendment to this section reflects the importance of ensuring that there is some mechanism – minimal as it is – to ensure that marking companies, utilities and excavators continue to maintain certain standards of locating and marking. The language, which provides no mandate as to time (i.e. periodic could be every three years or longer, etc.) or frequency (i.e. periodic is undefined), will encourage all parties to maintain standards in accordance with the best management practices developed by the Common Ground Alliance and American Public Works Association.

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**SECTION 3. Clarifying the Ability of the DPU to Require Further Training and Clarifying When a Penalty May Not be Applicable to an Excavator**

LANGUAGE:

Section 40E of Chapter 82 of the general laws, as appearing in the 2014 Official Edition, is amended by inserting the following sentences at the end thereof:-

The department of public utilities may require any person or company who does not comply with the provisions of sections 40A to 40E to complete a “Dig Safe” training program in lieu of a fine for a first offense. The penalties provided for in this section shall not apply to an excavator who damages an underground facility due to the failure of the company to comply with the provisions of section 40A to 40E.

RATIONALE:

As currently written in law, the DPU must levy a monetary fine for the first offense of the Dig-Safe law. The first sentence of the proposed amendment allows for the DPU to require the person or company who has not complied with the Dig-Safe law to attend a training program in lieu of the payment of fine. Note, this sentence does not require the DPU to forego a fine, but allows the DPU, at its discretion, to mandate additional training.

The second sentence of the proposed law simply recognizes the fact that mitigating factors are often recognized in common law. If an excavator damages an underground facility because a company, whether a marking company, utility or even another excavator, failed to comply with Dig-Safe law; then the excavator will not be required to pay a penalty. With that in mind, it is worth noting that this section does not entirely exculpate an excavator. The damage to the underground facility must be “due to the failure to comply with any provision of section 40A to 40E”. Just because a company violates a Dig-Safe provision, the excavator is not free from liability unless the damage occurred directly as a result of such violation by the company.