

Drafted & Reviewed  
By Legal Counsel  
*yet*

**AMENDMENT  
IN THE NATURE OF A SUBSTITUTE  
TO BILL NO. 31-0004  
OFFERED BY SENATOR JANETTE MILLIN YOUNG**

**Strike all language after the enacting clause and substitute in lieu thereof the following:**

**SECTION 1:** Title 31 Virgin Islands Code, Part 1, is amended by adding chapter 2 to read as follows:

**“Chapter 2. Underground Facility Damage Prevention and Safety**

**§21. Short title**

This chapter may be cited as “The Underground Facility Damage Prevention and Safety Act.”

**§22. Legislative intent**

The Legislature declares it to be the policy of the Government of the Virgin Islands and the purpose of this chapter to aid the public by preventing injury to persons and property and preventing the interruption of services resulting from damage to an Underground Facility caused by excavation or demolition operations and to provide minimum recommended guidelines for one-call legislation.

**§23. Definitions**

As used in this chapter, unless the context clearly indicates otherwise:

(a) "Tolerance Zone" means a strip of land not less than 18 inches on either side measured on a horizontal plane and from the outer edge of the exterior surface of the underground facility.

(b) "Business Days" means any day other than business days, excluding Saturdays and legal holidays as provided in Title 1, Section 171, Virgin Islands Code. "Hours" is meant to include all of the hours of a day.

(c) "Damage" means any impact upon or contact with, including without limitation, penetrating, striking, scraping, displacing, or denting, however slight, the protective coating, housing, duct, or other protective devices of any underground facility, or the removal or weakening of any lateral or vertical support from any underground facility, or the severance partial or complete, of any underground facility.

(d) "Demolish" or "demolition" means any operation by which a structure or mass of material is wrecked, razed, rendered, moved, or removed by means of any tool, equipment, or discharge of explosives, or any disturbances of the earth in any manner on public or private lands which could damage any underground facility.

(e) "Design Locate Request" means a communication to the Notification Center in which a request is made for locating existing utility facilities for bidding, predesign, or advance planning purposes. A Design Locate Request may not be used for excavation purposes.

(f) "Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Unexpected occurrence" includes, but is not limited to, fires, floods, windstorm, earthquakes or other soil or geologic movements, riots, accidents, vandalism, or sabotage that cause damage to an underground facility requiring immediate repair.

(g) "Excavation" means any operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means of tools, equipment, or explosives in any of the following ways, including but not limited to: grading, trenching, digging, ditching, drilling, auguring, boring, tunneling, scraping, cable or pipe plowing or driving, cable mining or salvage.

(h) "Excavator" means any person, firm, contractor or subcontractor, Operator, operator, utility, association, corporation, partnership, sole proprietor, business trust, government agency, or other entity which, with their, or his or her, own employees or equipment performs any excavation.

(i) "Field Mark" means stakes, paint, pin flags or temporary marks made in some other customary manner, placed in accordance with the CGA Best Practices Appendix B that identifies the approximate location of an underground facility.

(j) "Government Agency" means government agency as defined by 1, V.I.C. §253.

(k) "Inquiry Identification Number" means a unique number that is provided by the Notification Center to every person who contacts the center informing the center of its intent to excavate. This is also referred to as a 'locate request'.

(l) "Mechanized Equipment" means equipment operated by means of mechanical power including trenchers, bulldozers, power shovels, augers, backhoes, scrapers, drills, cable and pipe plows and other equipment used for plowing-in or pulling-in cable or pipe.

(m) "Notification Center" means a singular nonprofit association of Operators' of underground facilities that receives and transmits advance warning of excavations or other work close to existing underground facilities, for the purpose of protecting those facilities from damage, removal, relocation, or repair, as defined in Section 24 of this chapter.

(n) "Operator" means a person who owns, operates or controls an underground facility. A person is not considered an Operator solely because the person is an Operator or tenant of real property where underground facilities are located if the underground facilities are used exclusively to furnish services or commodities on that property, unless the underground facility crosses a public right of way, or unless the person is the Government of the Virgin Islands or a government agency thereof.

(o) "Person" means any individual, corporation, business trust, partnership, limited liability company, business trust, estate, trust, association, partnership, association, joint venture, sole

sole proprietor, government, government subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(p) "Positive Response" means a communication made to the Notification Center by an Operator reporting the status of a specific locate request.

(q) "Project Engineer" means any architect, engineer, planner, estimator or other person who prepares plans that requires excavation as herein defined.

(r) "Proposed Excavation Work" means any excavation activity, or excavation planning and design work.

(s) "Public Improvement" means any construction, reconstruction, improvement, enlargement, alteration, or repair of a building, roadway, drainage system, water system, street alleyway, sewer, ditch sewage disposal plant, water works, and all other structures or works of any nature by a government agency.

(t) "Underground Facility" means any public or private facility which is buried, placed below ground, or submerged on any Operator's right-of-way, easement, or permitted use which is being used or will be used in connection with the storage or conveyance of water, power, communications, petroleum products, natural gas, sewage, or other such substances transported underground; and includes, but is not limited to, pipes, ducts, sewers, conduits, cables, valves, lines, and associated underground equipment. The term does not include a liquefied petroleum

gas line, unless the line is subject to the requirements of Title 49, Code of Federal Regulations, provided there is no encroachment on any Operator's right-of-way, easement, or permitted use.

#### **§24. Notification Center Structure**

a. There is established a single, comprehensive territorial one-call Notification Center to provide notice of all excavations or demolitions near Underground Facilities.

b. The Notification Center is a non-profit corporation and governed by a board of directors that represents and is elected by facility Operators/operators, excavators, locators, and other stakeholders involved in underground utility damage prevention.

(c) All Operators, as defined in this chapter, shall participate in and share in the costs of one territorial Notification Center established pursuant to section 25 of this chapter. Costs for the Notification Center must be shared, in an equitable manner for services received, by facility Operators, as determined by the Center's board of directors.

(d) The Notification Center shall maintain and make available the name, mailing and physical address, and telephone number of the office, department, or other source from or through which information respecting the location of underground facilities or gas pipes of its participating underground facility Operators or operators may be obtained.

(e) The board of directors may contract with a third party service provider to provide the services of the Notification Center provided in section 25 of this chapter.

**§25. Elements of the Notification**

The Notification Center shall:

- (1) Operate in all areas of the territory containing underground facilities;
- (2) Receive and distribute advance notifications of excavations or demolitions to all member Underground Facility Operators for the purpose of marking underground facilities, except as provided by this chapter;
- (2) Develop and implement a public awareness/damage prevention program to educate the general public, excavators, and Operators/Operators, about the one-call telephone number and the requirements and penalties of the chapter;
- (4) Provide for acceptance of '811' dialed calls 24 hours a day and 365 days a year, to receive and record the information provided by excavators and project engineers and to respond to information requests from excavators and project engineers, if available. In the alternative, an existing nationally-accessible toll-free telephone number and facsimile number may also be made or kept available.
- (5) Establish and maintain a "Positive Response" system whereby Operators can electronically report the status of a locate request received and whereby excavators can monitor

the status of a locate request it submitted. The status of the locate request may be reported as one of the following classifications:

(A) No Conflict – the Operator has no facilities within the excavation area described in the locate request;

(B) Facility has been marked;

(C) Invalid locate information – the excavation area described in the locate request cannot be found or determined; or

(D) An alternate marking schedule has been agreed to by the excavator and locator when updating a locate request using this classification must have a documented written agreement that includes:

(i) Name of each party to the agreement;

(ii) Date the agreement was made; and

(iii) Details of the alternate marking schedule

(f) Transmit prompt notification to Operators on a 24-hour a day, seven-day a week basis;

and

(g). Maintain professional liability and errors and omissions insurance to cover duties established by this chapter.



**§26. Planned excavation; inquiry; time; marking area; identification number; notification of a member with underground facilities; records**

(a) Except in an emergency, every person planning to conduct any excavation or demolition operation shall inform the Notification Center of the intended excavation, at least 2 business days, but not more than 14 calendar days, prior to commencing that excavation.

(b) In addition to providing a clear description of the planned excavation area, when the excavation site cannot be clearly and adequately identified on the locate ticket, the excavator shall designate the route or area to be excavated by using white paint or other suitable means prior to the arrival of the locator.

(c) The Notification Center shall provide an Inquiry Identification Number to the person who informs the center pursuant to this section and shall promptly notify any member who has an Underground Facility in the area of the proposed excavation. An inquiry validation number will be valid for 14 calendar days beginning two business days after notification of intent to excavate.

(d) A record of all notifications by excavators and Operators to the Notification Center must be maintained in accordance with applicable statutes. The records must be available for inspection by the excavator and any member, or their representative, during normal business hours and according to guidelines for inspection as may be established by the Notification Centers.

(e) An excavator shall provide the following information to the Notification Center:

- (1) The excavator's name, mailing and physical address, telephone number and facsimile number, that of their employer if subcontracting and the project Operator;
  - (2) The nature and extent of the excavation or demolition, including, but not limited to, the type of work being done, the depth if known;
  - (3) Whether directional boring will be used;
  - (4) The start date and time; duration of the work; and
  - (5) The location of the work.
- (f) For purposes of locating the work, the excavator shall supply the physical address for the property, closest road crossing, or intersection, or such other location identifier as required by the Notification Center.
- (g) . The Notification Center shall provide to the excavator a list of all Operators being notified of the intended notification at the time of the excavator's notification.

**§27. Marking Underground Facilities; noncompliance with requirement; records**

(a) Any Operator of a Underground Facility who receives timely notification of any Proposed Excavation Work in accordance with section 26 of this chapter shall, within 2 business days after that notification, or before the indicated start of the excavation work, whichever is later, or at a later time mutually agreeable to the Operator and the excavator, locate and Field Mark the approximate location of its facility.

(b) Any Operator who receives timely notification of any Proposed Excavation Work in accordance with section 26 shall update the status of the notification request through the Positive Response System at the One-Call Notification Center. If a Positive Response System is not available, the Operator shall make reasonable efforts to communicate the status of the notification request directly to the excavator. Communication to the excavator may include one or more of the following: marking the facilities, telephone communication or voice-mail, facsimile, email. Reasonable efforts are defined as 3 attempts of any of the above stated communication methods.

(c) Every Operator of an Underground Facility shall Field Mark the location of an Underground Facility in conformance with the current marking requirements set forth by the CGA Best Practices Appendix B.

(d) The excavator shall notify the Notification Center of any obvious failure of an Operator to comply with this section before any excavation commences. The excavator may proceed if such excavator exercises due care and caution to prevent damage to any Underground Facility.

#### **§28. Excavating near underground facilities**

When excavating within the Tolerance Zone, the excavator shall do all of the following:

- (1) Plan the excavation to avoid damage to or minimize interference with the underground facilities in and near the construction area;
- (2) Determine the exact location of any marked Underground Facility utilizing non-invasive methods of excavation. Methods to consider include hand digging, pot holing,

soft digging, vacuum excavation methods or any other methods with the approval of the facility Operator. For parallel type excavations, the existing facility shall be exposed at intervals as often as necessary to avoid damages;

- (3) Maintain 18" clearance between any Underground Facility and the cutting edge or point of Mechanized Equipment.
- (4) Provide such support for underground utilities in and near the construction area, including backfill operations, as may be reasonably required by the operator for the protection of such utilities;
- (5) When using a trenchless excavation technique, perform electronic monitoring of the drilling head during the backream procedure as well as the pilot hole drilling;
- (6) Protect and preserve the markings of approximate locations of underground facilities until those markings are no longer required for proper and safe excavations. If, at any time during an excavation, an Operator's Field Markings are no longer reasonably visible, the excavator shall notify the Notification Center. The Notification Center shall contact all known members who have underground facilities in the area of the excavation. Upon receiving timely notification or re-notification pursuant to this paragraph, the Operator shall re-locate and re-mark, as soon as possible, but no later than 48 hours, those underground facilities that may be affected by the excavation to the extent necessary, in conformance with this section;
- (7) As soon as any damage to a Underground Facility or its protective facilities, including grounding and warning tape, is discovered, report the type and location of the damage to the Notification Center and the Operator, if known, and cooperate to mitigate

damages to the extent reasonably possible, including the provision of in-kind work by the excavator where technical or specialty skills are not required by the nature of the Underground Facility. Such in-kind work may be under the supervision and pursuant to the specifications of the Operator; and

- (8) Immediately report to the Operator and, appropriate law enforcement agencies and fire departments, any damage to a Underground Facility that results in escaping flammable, corrosive, explosive, or toxic liquids or gas, and take reasonable actions needed to protect persons or property and to minimize safety hazards until those agencies and departments and the Operator arrive at the scene.

**§29. Project engineer's responsibility; design requests**

(a) Any person may submit a Design Locate Request to the Notification Center. The Design Locate Request must:

- (1) Describe the tract or parcel of land for which the Design Locate Request has been submitted with sufficient particularity, as defined by policies developed and promulgated by the Notification Center, to enable the facility Operator to ascertain the precise tract or parcel of land involved; and

- (2) State the name, mailing and physical address, telephone number and facsimile number of the person who has submitted the Design Locate Request, and the company name of the project Operator.

(b) No later than 10 business days after a Design Locate Request has been submitted to the Notification Center for a proposed project, the facility Operator shall respond by one of the following methods:

(1) Designate the location of all utility facilities within the area of the proposed excavation;

(2) Provide to the person submitting the Design Locate Request the best available description of all utility facilities in the area of proposed excavation, which might include drawings of utility facilities already built in the area, or other facility records that are maintained by the facility Operator; or

(3) Allow the person submitting the Design Locate Request or any other authorized person to inspect or copy the drawings or other records for all utility facilities within the proposed area of excavation.

(c) Operators have the right to recover reasonable and compensatory costs for providing information pursuant to a Design Locate Request.

### **§30. Permit validity contingent on compliance**

Before commencing any excavation activity, an Inquiry Identification Number issued by the Notification Center must be provided to the Department of Planning and Natural Resources. No permit to excavate issued by a government agency is valid unless the excavator has also provided an Inquiry Identification Number issued by the Notification Center to the Department of Planning and Natural Resources.

### **§31. Government agencies**

The requirements of this chapter apply to government agencies that own or operate underground facilities or that perform excavation or demolition, with the exception of underground emergency repair to traffic control devices used on any street or highway under the agency's jurisdiction. The government agency shall notify the Notification Center of the emergency repair site at the earliest opportunity and take all reasonable precautions to protect any Underground Facility.

**§32. Violations; penalties; other remedies; government immunity; actions**

(a) Any person who violates the requirements of this chapter shall:

(1) On the first offense, receive a written warning notification or complete a damage prevention education program provided by the Notification Center.

(2) On the second offense within a 12-month period, be subject to a civil penalty for a minimum of \$250 and required to repeat the damage prevention education program provided by the Notification Center.

(3) On subsequent offenses within a 12-month period, be subject to a civil penalty for a minimum of \$500 per violation and referral to the Department of Licensing & Consumer Affairs or the appropriate licensing board.

(4) Any person who knowingly and willfully violates any of the provisions of this

chapter is subject to a civil penalty in an amount not to exceed fifty thousand dollars (\$50,000).

(b) Good faith, flagrancy, or magnitude of an offense may permit deviation from subsection (a). In determining the amount of any penalty, the following must be considered:

(1) The nature, circumstances and gravity of the violation;

(2) The degree of the person's culpability;

(3) The person's history of prior offenses;

(4) The person's level of cooperation with the requirements of this regulation;

(5) Effect of the penalty on the person's ability to continue business; and

(6) The good faith on the part of the person in attempting to remedy the cause of the violation shall be considered.

(c). The Attorney General may bring an action to recover a civil penalty under this section

(d) Any civil penalty imposed pursuant to this section, including reasonable attorney's fees, must be paid to the prevailing party.



(e) The penalties provided in this article are in addition to any other remedy at law or equity available to an excavator or to the Operator of a damaged Underground Facility.

(f) No civil penalty may be imposed under this section against an excavator or Operator who violates any this chapter if the violation occurred while the excavator or Operator was responding to a service outage or other emergency; but the penalty must be imposed if the violation was willful or malicious.

(g) This section may not be construed to limit any other law granting governmental immunity to government agencies or to impose any liability or duty of care not otherwise imposed by law upon any government agency.

Except as otherwise specifically provided in this chapter, this section is not intended to affect any civil remedies otherwise provided by law for personal injury or for property damage.

(h). Any person who willfully or maliciously removes a marking used by an Operator to mark the location of any Underground Facility, except in the ordinary course of excavation, is guilty of a misdemeanor, and, upon conviction thereof, in addition to any order for restitution, shall be punished by a fine of not more than \$5,000 for each offense, by imprisonment for not more than one year or by both such fine and imprisonment.

j. The Department of Planning & Natural Resources shall administer the civil fines and penalties or fines under section 32. For any disputed penalties or fines, the Commissioner of

Planning & Natural Resources shall establish an Advisory Committee consisting of impartial representatives from the excavating industry, the locating industry, the Notification Center staff or board of directors, a utility Operator, and the general public.

**§33. Liability; damages**

(a) Whenever a person has violated, intends to violate, or will violate any provision of this chapter, the Attorney General or any person may institute a civil court action for injunctive relief.

(b) If any Underground Facility is damaged as a proximate result of a excavator's failure to comply with the provisions of this chapter, the excavator is liable to the Operator of the Underground Facility for any cost or damage incurred by the Operator in restoring, repairing, replacing its damaged Underground Facility, and other consequential damages, including but not limited to loss of product, loss of use, interruption of service occurring because of the damage or injury to the Underground Facility, together with reasonable costs and expenses of suit, if any, including reasonable attorneys' fees if the Operator is a member of the Notification Center. Additionally, the exactor is liable for any injury or damage to persons or property resulting from the damage to the Underground Facility, and shall indemnify, defend and hold harmless the affected Operator against any and all claims or actions, if any, for personal injury, death, and property damage or service interruption proximately caused by the damage to the Underground Facility.

(c) If any Underground Facility is damaged as a proximate result of an Operator's failure to comply this chapter, that Operator shall forfeit any claim for damages with its Underground

Facility arising from the excavation against an excavator who has complied with this chapter. The Operator is liable for any reasonable cost or damage incurred directly by the excavator as a result of any delay in the excavation project while the Underground Facility is restored, repaired, replaced together with reasonable costs and expenses of suit, if any, including reasonable attorneys' fee. Additionally, the Operator is liable for any injury or damage to persons or property proximately caused by the Operator's failure to comply with the provisions of this chapter, and shall indemnify, defend and hold harmless the affected excavator against any and all claims or actions, if any, for personal injury, death, property damage or service interruption proximately caused by the Operator's failure to comply.

#### **§34. Negligence per se**

Violation of this chapter by an excavator or Operator constitutes negligence per se.

#### **§35. Alternative dispute resolution**

The Notification Center shall establish a voluntary alternative dispute resolution program in consultation with its members and all affected parties. The alternative dispute resolution program must be available to all Operators, excavators, and other interested parties regarding disputes arising from damage to underground facilities including but not limited to, any cost or damage incurred by the Operator or the excavator as a result of any delay in the excavation project while the Underground Facility is restored, repaired or replaced, exclusive of civil penalties set forth in Section 32 of this chapter which cannot be resolved through consultation and negotiation. The alternative dispute resolution program must include mediation, arbitration, or other appropriate process of dispute resolution. The issue of liability and amount of damages under territorial law

may be decided by the appointed arbitrator or by the parties in mediation. Nothing in this section may be construed to change the basis for civil liability for damages.

### **§36. Exemption and exceptions**

This chapter does not apply to any individual, private owner of real property who excavates on the property, not requiring a permit issued by a government agency, and not bordering on public rights-of-way. This exemption does not apply to a contractor or any other professional hired to perform the excavation. This chapter does not apply to making excavation or demolition during an emergency, when the Notification Center is notified at the earliest opportunity and all reasonable precautions have been taken to protect underground facilities.

### **§37. Non-delegable duty**

An Operator or excavator subject to performance of duties imposed by this chapter may not delegate his responsibilities to any other person or related entity for those duties imposed by this chapter.

**SECTION 2.** Title 33, Virgin Islands Code is amended by adding a new Section 3100z to read as follows:

#### **“§3100aa. Underground Facility Damage Prevention and Safety Fund.**

(a) There is established in the Treasury of the Virgin Islands a special fund designated the “Underground Facility Damage Prevention and Safety Fund” (the “Fund”).

(b) The Commissioner of Finance shall administer the fund as a separate and distinct fund and no monies from the Fund shall be available for expenditure except as provided in this section.

(c) The Fund consists of all:

- (1) Sums appropriated from time to time by the Legislature;
- (2) Public and private grants gifts, donations, bequests and devises of money made thereto; and
- (3) Fines resulting from violation of 31 V.I.C, chapter 2, regulations promulgated thereunder.

All such sums shall remain available until expended.

(d) The Commissioner of Finance shall disburse monies from the Fund upon authorization and direction of the Commissioner of Planning and Natural Resources, for administrative expenses, personnel expenses and equipment cost, and all reasonable (direct and indirect) costs required to implement and support the Notification Center implemented by the pursuant 31,V.I.C.Chapter 2, Virgin Islands Code and the regulations promulgated thereunder and to supplement the existing public awareness/damage prevention program to educate the general public, excavators, and Operators/Operators.

(e) The Commissioner of Finance shall maintain a record of all monies deposited into and disbursed from the Fund and shall annually report to the Governor and the Legislature, as well as the Commissioner of Planning and Natural Resources, as to the status of the Fund.”

**SECTION 3.** The Commissioner of Planning & Natural Resources may promulgate such regulations pursuant to 3 V.I.C., chapter 35, as considered necessary to effectuate the purposes of this Act.

**SECTION 3.** This Act takes effect January 1, 2016.

**Amendment No. 31-336/April 24, 2015/YLT**

**DRAFTER'S NOTE**

**This measure should be in title 12 since it is DPNR that is responsible for enforcement.  
Moreover, the Notification Center should be established within DPNR.**