



## ALABAMA UTILITY CONTRACTORS ASSOCIATION

TIM AYERS, EXECUTIVE DIRECTOR  
JULY 2019



### **Director's Comments:**

Last week, as I started to write this newsletter, a story broke about two men being trapped in a trench cave-in at a residential drainage project just outside of Birmingham. The news reporters were holding out hope that the workers would be able to be rescued safely. However, after being buried in an eight foot deep trench for more than two hours, the two men were obviously deceased when first responders were finally able to dig them out.

This was an extremely tragic occurrence, especially given that it was preventable. During my time at AUCA, I have personally sat through several OSHA Competent Person Trenching & Excavation Classes. One could only hope that these two workers had been given the same opportunity by their employer. Which begs to question, were they "trained" and just chose to ignore industry safety standards, or were they inexperienced and never included by their employer in a Trench Safety Class? If untrained, why were they allowed on a job of this nature, and regardless of their experience, why was there no trench box or shoring used for an 8' trench?

An OSHA investigation is underway, and undoubtedly lawsuits will follow. As an industry, we must be proactive to ensure that these sort of preventable incidents do not continue. AUCA has several member companies that specialize in offering safety training, and/or sell and rent safety equipment. With workloads continuing to increase, make sure that if you have inexperienced workers you give them the proper training. If you have experienced workers, never let them believe it's okay to cut corners on safety in order to get the job done. If so, it may just be a fatal mistake.

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*Tim*

**Upcoming AUCA Events:**

***AUCA Local Lunch Meetings***

**Huntsville Area Lunch Meeting - August 8, 2019**

**Tuscaloosa Area Lunch Meeting - August 14, 2019**

**Mobile Area Lunch Meeting - August 15, 2019**

**Birmingham Area Lunch Meeting - August 21, 2019**



***AUCA Fall General Meeting &  
Sporting Clay Shoot***



**October 17, 2019**

**Lower Wetumpka Shotgun Sports Club  
Montgomery, AL**

**Special Guest Speaker:  
Tommy Tuberville  
Former Auburn University  
Head Football Coach  
and  
2020 Republican  
U.S. Senate Candidate**



Upcoming Industry Events:



DESIGNED BY CONTRACTORS, FOR CONTRACTORS

**Construction Risk Conference**  
**August 22, 2019**  
**9:00 a.m. - 3:30 p.m.**  
**Alabama AGC Headquarters**  
**Birmingham**

*Presented by CompTrustAGC and co-sponsored by the Construction Law Section of the Alabama State Bar*

RiskCon is the only one-day event in Alabama dedicated to administrative and job site risks facing those working within the construction industry. This mini-conference is appropriate for business owners, senior management, risk managers, project supervisors, field management, safety professionals, attorneys, and insurance & bonding professionals.



**September 17 – 19, 2019**  
**The Grand Hotel, Point Clear**

**NEW LOCATION!**

September 17 - 19, 2019  
The Grand Hotel  
Point Clear  
Register today  
Group rates available  
Early registration savings

ALABAMA damage prevention summit  
A CGA REGIONAL PARTNER EVENT

Join us for the Locate Rodeo, Workshops and expert led Training Sessions

Don't miss this opportunity to network with stakeholder groups from all across the state with the common goal of damage prevention.

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888 - 548 - 6363

ALABAMA damage prevention summit  
A CGA REGIONAL PARTNER EVENT

September 16, 2019

**Locate Rodeo**

No entry Fee!

Test your skills against others in the industry. Win cash prizes and a chance for an all-expense paid trip to the 2019 International Locate Rodeo.

For more information,  
[www.alabama.damagepreventionsummit.com](http://www.alabama.damagepreventionsummit.com)  
888.548.6363



## Upcoming Industry Events:

### 2019 APACT PIPELINE AWARENESS MEETINGS

ALABAMA 811, IN PARTNERSHIP WITH 72 GAS AND PIPELINE OPERATORS IN ALABAMA, IS HOLDING ITS ANNUAL PIPELINE PUBLIC AWARENESS MEETINGS STARTING IN JULY. THESE MEETINGS ARE FREE TO ATTEND, LAST APPROXIMATELY 2 HOURS, WITH MOST STARTING AT 5:15PM. COMPLIMENTARY MEAL PROVIDED AT EACH MEETING.

8/6 - MOBILE, BALDWIN

8/8 - BUTLER, CONECUH, COVINGTON, CRENSHAW  
ESCAMBIA, MONROE

8/15 - HALE, PERRY, TUSCALOOSA

8/20 - BULLOCK, CHAMBERS, LEE, MACON, RUSSELL

8/22 - CALHOUN, CLEBURNE, ETOWAH, ST. CLAIR

8/27 - CLARKE, WASHINGTON, WILCOX

8/28 - PICKENS, GREEN, SUMTER

8/29 - BIBB, CHILTON, SHELBY

9/5 - FAYETTE, LAMAR, MARION, WINSTON

9/12 - COLBERT, FRANKLIN, LAUDERDALE, LAWRENCE

Meetings are geared toward emergency responders, public officials and excavators who live and work around these pipelines on a regular basis.

Take the opportunity to meet operators in your areas.

Learn valuable information about 811, and working around underground utilities.



Know what's below.  
811 before you dig.

TO REGISTER AND DETAILS:  
[WWW.APACTPIPELINEAWARENESS.COM](http://WWW.APACTPIPELINEAWARENESS.COM)

## News & Notes:

### **AUCA 2020 Board of Directors Nominations:**

AUCA is seeking nominations from members interested in serving on the 2020 AUCA Board of Directors. If you are interested in serving, or know someone that you think would be an asset to the AUCA Board, please submit the recommendation by August 31st.

Nomination Forms will be sent out electronically to all member companies. The Nominating Committee will review the nomination forms submitted by those desiring to serve on the 2020 Board at the September 11th AUCA Board Meeting. The proposed slate of nominees will be announced to the membership and the candidates will be voted on by the members in attendance at the October 17th AUCA General Meeting in Montgomery.

### **OSHA Safe + Sound Week:**

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) will join businesses and organizations nationwide to recognize the importance and successes of workplace safety and health programs during Safe + Sound Week, August 12-18, 2019.

The week-long event encourages employers to implement workplace safety initiatives, and highlight workers' contributions to improving safety. Businesses that incorporate safety and health programs can help prevent injuries and illnesses, reduce workers' compensation costs, and improve productivity. Organizations of any size or in any industry looking for an opportunity to show their commitment to safety to workers, customers, the public, or supply chain partners should participate.



### **U.S. Congresswoman Martha Roby Won't Seek Reelection:**

U.S. Representative Martha Roby, who since 2011 has represented Alabama's 2nd Congressional District as a Republican in the U.S. House of Representatives, has announced she will not seek a sixth term in Congress. The announcement of her retirement came as a surprise to many, and it will be very interesting to see the candidates that emerge to run for the office in 2020.



## News & Notes:

### **Alabama Underground Damage Prevention Authority:**

On June 6th, Governor Kay Ivey signed Act 2019-407, which updated the Alabama Underground Damage Prevention Law, and calls for the creation of the Underground Damage Prevention Authority. The Underground Damage Prevention Authority will enforce the Alabama Underground Damage Prevention Law and review penalty provisions and the adequacy of the enforcement process. The authority shall be composed of a board of underground facility protection stakeholders comprised of one subject matter expert representative from designated stakeholder groups.

AUCA has been asked to submit some names for consideration for Governor Ivey to appoint as a subject matter expert representative of the "Professional Excavator Industry" to serve on the newly created Underground Damage Prevention Authority Board.

If you are interested in learning more about this opportunity, please contact the AUCA office.

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### **Thompson Tractor Company Equipment Operator Challenge:**

Thompson Tractor Company recently held Equipment Operator Challenge events in Hanceville and Montgomery. Operators were put to the test in a range of machines and tasks. Each performance was scored based on speed, accuracy, and operating best practices. Penalties were also imposed for errors. The top 5 winners from each location will compete again in finals in Montgomery, and the overall winner will receive a trip to North Carolina to compete in the North America Regional finals.



# ALABAMA CONSTRUCTION LAW NEWSLETTER

WALLACE  JORDAN  
WALLACE, JORDAN, RATLIFF & BRANDT, LLC

June 2019

## Specifications in Subcontract Control Over Those in Prime Contract

*Peachstate Roofing, Inc., v. Kirlin Builders, LLC* 2018 WL 3097326 (M.D. Ala. June 22, 2018).

The court considered a dispute between a roofing subcontractor and general contractor and conflicting contractual provisions in their subcontract and the prime contract. In play was a subcontract “flow down” provision saying the subcontractor would be bound to the general contractor to the extent the general contractor was bound to the owner in the prime contract. Also pertinent

was subcontract provision saying that its terms would govern any inconsistent provisions between the subcontract and prime contract. The court, relying on this inconsistent provisions clause, found that the subcontractor was not bound to follow certain roofing specification requirements that were undisputedly contained in the prime contract because they were not included in its subcontract. The court also found that the general contractor was being informed throughout the project by the

owner of issues with the roofing subcontractor’s work but failed to pass those owner concerns down to the subcontractor. In failing to do so, the court found that the general contractor violated an implied covenant to work in good faith with its roofing subcontractor.



## Surety Entitled to Rely on “Pay if Paid” Clause in Subcontract

*Keller Construction Company of NW Florida, Inc. v. Hartford Fire Insurance Company*, 2018WL 5306918 (Ala. Civ. App. Oct. 26, 2018).

The court considered a subcontractor’s claim that it should be entitled to recovery for retainage and extra work from a general contractor’s surety bond. In response, the surety argued that the subcontractor’s recovery should be

denied because the subcontract contained a “pay if paid” clause and the owner had not paid the general contractor. The court sided with the surety and found that the surety could rely on the subcontract’s “pay if paid” clause because owner payment to the general contractor was a condition precedent to entitlement to payment to the subcontractor. The court found it persuasive

that wording in the subcontract stated that the surety was a “third-party beneficiary” of the “pay if paid” clause in the subcontract and that the surety was entitled to assert the “pay if paid” clause in the subcontract as a defense.

## Location of Arbitration Proceeding Determined by Court

*Alliance Investment Co, LLC v. Omni Co., Inc.*, 2019 WL 1219416 (Ala. Mar. 15, 2019).

The Alabama Supreme Court determined that the location of an arbitration proceeding involving claims between a contractor and subcontractor should be determined by the

arbitrator and not the court. In making this determination the court considered a subcontract that clearly found that claims would be resolved in arbitration but had one provision saying the proceedings would take place in Alabama while another said Ohio. In reaching its

conclusion, the Alabama Supreme Court overturned a lower court's ruling finding that the proceedings should take place in Ohio and determined that this arbitration location decision could only be made by the arbitrator and not the court.

## Subcontractor's Payment Bond Suit Must Be Resolved in the Location of the Project

*Ex Parte Consolidated Pipe and Supply Co., Inc. v. The Ohio Casualty Insurance Company*, 256 So. 3d 1267 (Ala. 2018).

The court found that the only location for a lawsuit by a subcontractor against a general contractor's payment bond was in the county in which the project was located. In this case there was a question as to whether or not a lawsuit could take place in the location of the project

or where the general contractor's business was located. The court found that the performance bond contained a clause saying that suit should take place in a court in the same county where the

project was located. The court enforced that clause and found that "forum selection" clauses such as this should be enforced as long as they are reasonable.



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*The construction law practice group of Wallace, Jordan, Ratliff & Brandt handles a full range of legal issues related to all aspects of a construction project. The attorneys working in this area represent owners, developers, design professionals, contractors, subcontractors, and suppliers in all areas related to the construction industry. Visit us at [alabamaconstructionlaw.com](http://alabamaconstructionlaw.com) and [wallacejordan.com](http://wallacejordan.com) to learn more.*

## ***Clean Water Construction Coalition Report***

From Bob Briant, Jr. - Chairman CWCC & Sante Esposito - Key Advocates

### **CLEAN WATER AND DRINKING WATER APPROPRIATION BILLS CONTINUE TO MOVE**

The House has decided to package appropriations bills into what they are calling "minibuses" rather than consider bills individually on the Floor. On June 25, the House passed a "minibus" that includes the FY20 Interior Appropriations Bill providing \$1.810B for the Clean Water SRF, \$1.3B (the amount authorized by the America's Water Infrastructure Act of 2018) for the Safe Drinking Water SRF, and \$50M for WIFIA. If the Senate passes a similarly funded measure, the Clean Water SRF would be increased \$100M over the last Federal Fiscal Year while the Drinking Water SRF will would be increased \$140 M. No action to date on the Senate version(s).

On June 19, the House passed its version of the FY20 Energy and Water Appropriations bill as part of another "minibus" which provides \$63.617M for Title XVI (of which \$10M is for the Title XVI WIIN grant program) and \$60M for WaterSMART, and lists the names of the FY18 USBR Title XVI grant awardees, as required by law. No action to date on the Senate version(s).

### **CWCC ASSESSES VIABILITY OF AN INFRASTRUCTURE PACKAGE**

With the relationship between President Trump and the congressional Democrats spiraling, the top-line funding targets for an infrastructure package remain elusive. You will read Key Advocate's Sante Esposito's assessment of the current state of affairs in Congress. Given all of the moving parts and changing currents, the Coalition's approach will be threefold: stay engaged with the key players in Congress and the Administration; encourage action on an infrastructure bill; and, advocate for our priorities.

Highlights of some positive signals include:

- Chairman DeFazio is drafting his FAST Act reauthorization bill with a goal toward House action in the fall and the possible cornerstone for a mega infrastructure bill;
- The T&I Committee is expected to markup Chairman DeFazio's Clean Water/Alternative Water Source Program bill by the August recess;
- On June 25, the T&I Subcommittee of Water Resources and Environment will be holding a hearing on Restoring America's Iconic Waters";
- The House Natural Resources Committee held a subcommittee hearing today on the Napolitano and Harder WIIN grant authorization bills pending consideration by the Full Committee;



## *Clean Water Construction Coalition Report*

*(Continued from page 9)*

- The House Energy and Commerce Committee held a hearing on H.R. 2741 to increase funding authorizations for the Safe Drinking Water SRF;
- Congressman McNerney has, subject to confirmation, decided to break up his WEST Act of last Congress and introduce individual bills that include matters under the jurisdiction of specific committees;
- Speaker Pelosi said during a recent press conference: "We are not giving up on infrastructure. We're going to do infrastructure, build the infrastructure of our country.";
- Congressman Blumenauer introduced H.R. 2864 that would raise the gas tax by 25 cents at 5 cents per year for 5 years and will also be indexed for inflation for infrastructure projects;
- Majority Leader Hoyer has put together a small working group from the leadership, the Appropriations, Ways and Means and Rules Committees to strategize on infrastructure;
- Key House Republicans such as Congressman Sam Graves, Ranking Republican on the T&I Committee, and Rodney Davis, Ranking Republican on the Highways and Transit Subcommittee, have publicly expressed support for an infrastructure bill;
- SEPW has targeted the August recess for its version of the FAST Act;
- Senate Commerce has solicited infrastructure asks from its members;
- Reports are that Senators Feinstein and Gardner have drafted a WEST water bill that includes reauthorization of the WIIN grant program;
- Senate Democrats, via Minority Leader Schumer, has called on his fellow Senators, including Republicans, to move forward on an infrastructure bill;
- Key Senate Republicans such as Senators Graham and Grassley have publicly expressed support for an infrastructure bill; and,
- The Trump Administration, via USDOT, continues to engage the Hill on the scope and funding of an infrastructure bill.

### **CONGRESSIONAL HEARINGS PRESS INFRASTRUCTURE AGENDA SUPPORT FOR H.R. 1497 GROWS**

As has been previously discussed and reported, the Coalition sent a letter of support for H.R.1497, the "Water Quality Protection and Job Creation Act of 2019." This bill, introduced by Chairman DeFazio, Subcommittee Chairwoman Napolitano, and Representatives Don Young and John Katko, now has 39 cosponsors. As a reminder, the bill:



## *Clean Water Construction Coalition Report*

*(Continued from page 10)*

- Authorizes \$20 billion in Federal grants over five years for Clean Water SRFs.
- Authorizes \$1.5 billion over five years for grants to implement state water pollution control programs.
- Provides \$600 million over five years for Clean Water pilot programs (including Federal technical assistance and/or grants) for watershed-based or system-wide efforts to address wet weather discharges, to promote storm water best management practices, to undertake integrated water resource management, and to increase the resiliency of treatment works to natural or man-made disasters.
- Authorizes \$375 million in grants over five years for alternative water source projects including projects that reuse wastewater and storm water to augment the existing sources of water.



## *Fleet Safety:*

*Provided by Josh Broaddus @ J. Smith Lanier & Company*

### **CAN YOU HEAR ME NOW? CELL PHONES, TEXTING AND DRIVING**

There's less talking on cell phones when people are behind the wheel, but a lot more fiddling with them. Drivers were 57 % more likely to be observed using their cell phones to text, send e-mails or for purposes other than making phone calls, and were less likely to be seen holding or talking on hand-held phones.

Those are the main findings of a new study that compared observational surveys conducted in both 2014 and 2018 of drivers while moving or stopped at red lights in four Northern Virginia communities. The report was recently released by the Insurance Institute for Highway Safety, a nonprofit financed by the insurance industry.

*"The latest data suggest that drivers are using their phones in riskier ways,"* David Kidd, co-author of the study and a senior research scientist with the Highway Loss Data Institute, an affiliate of the Insurance Institute, said in a statement.

The report didn't find evidence of an increase in distracted driving overall between the two survey years, but its results were consistent with research indicating that drivers are talking on hand-held phones less and operating them more than in recent years. *"The observed shift in phone use is concerning because studies consistently link manipulating a cell phone while driving to increased crash risk,"* Kidd added.

Based on recent research indicating that fatal crash risk is 66 % higher when controlling a phone, the institute estimated that more than 800 crash deaths on United States roads in 2018 could be attributed to drivers texting or using phones for things other than talking.

The report stressed the dangers of cell phone use while driving, detailing how it affects the way drivers scan and process information from the roadway.

For example, it noted that drivers generally take their eyes off the road to dial, send texts, use apps and browse the web on a hand-held phone, and when engaged in phone conversations, tend to concentrate their gaze toward the center of the roadway, *"but their attention still may be diverted from driving and make it difficult for them to process what they are looking at."*



## *Fleet Safety:*

*(Continued from page 12)*

### **State Laws**

Many states have passed laws related to cell phone use in the car. 21 states—Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Minnesota, New Hampshire, New Jersey, New York, Nevada, Oregon, Rhode Island, Tennessee, Vermont, Washington and West Virginia—and the District of Columbia have banned hand-held phone use by all drivers.

Washington was the first state to pass a texting ban in 2007. Currently, 48 states, D.C., Puerto Rico, Guam and the U.S. Virgin Islands ban text messaging for all drivers.

Tennessee and Florida are the newest states to enforce a hands free law, where drivers can be ticketed for even holding their phones behind the wheel.

### **Cell Phone Policy**

Employers are obligated to safeguard their employees from injuries they might sustain on the job. They can help prevent auto accidents by developing a written Policy on the use of cell phones and texting while driving. The best approach is to prohibit employees from using cell phones while driving “on-the-job”.

If you need assistance in drafting a cell phone policy, please contact your JSL Risk Control Consultant. You can also get help from certain government agencies such as the Texas Division of Workers Compensation or other organizations such as the National Safety Council.

Once a Policy banning cell phones and texting is established, it also needs to be consistently and effectively enforced.

### **Employer Liability**

Besides the goal of preventing injuries and property damage, another reason Employers should implement a Policy banning cell phones and texting is that they can be held vicariously liable for injuries to third parties caused by auto accidents triggered by distracted employees.

This applies to Company vehicles but also if employees drive their personal vehicles on behalf of the Employer. So ensure the cell-phone Policy applies to personal vehicles operated on behalf of the Company and that is also consistently and effectively enforced.



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**AUCA IS A MEMBER-DRIVEN, NEEDS  
FOCUSED TRADE ASSOCIATION CREATED  
SOLELY TO PROMOTE AND ADVANCE THE  
UTILITY INDUSTRY IN THE STATE OF  
ALABAMA.**

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please print out a copy for him/her.**

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