



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 19-43

July 18, 2019

Investigation of the Department of Public Utilities, on its own motion, instituting a rulemaking pursuant to G.L. c. 30A, § 2, and 220 CMR 2.00, to amend 220 CMR 99.00, Procedures for the Determination and Enforcement of Violations of M.G.L. c. 82, §§ 40 through 40E ("Dig Safe").

ORDER ADOPTING EMERGENCY REGULATIONS

I. INTRODUCTION

By this Order, and pursuant to G.L. c. 30A, § 2 and 220 CMR 2.00, the Department of Public Utilities (“Department”) commences a rulemaking proceeding and adopts emergency revisions to 220 CMR 99.00, “Procedures for the Determination and Enforcement of Violations of M.G.L. c. 82, §§ 40 through 40E (“Dig Safe”).” The Department hereby adopts these revisions as Emergency Regulations because their immediate implementation is necessary to ensure public safety. These revisions are designed primarily to implement the federal minimum safety requirements for damage prevention, pursuant to 49 C.F.R. Parts 192 and 196. The Department also adopts changes to 220 CMR 99.00 for the following reasons: (a) to clarify the obligations of both excavators and utility companies; (b) to establish more efficient procedures for the enforcement of violations; and (c) to correct minor errors and delete outdated, duplicative, or unnecessary information.¹

The Emergency Regulations are effective upon filing with the Secretary of the Commonwealth and will remain in effect for a period not to exceed three months.² The Department intends to solicit comments on the Emergency Regulations, conduct a public hearing, and promulgate final regulations amending 220 CMR 99.00 as indicated below.

¹ For example, where the Dig Safe law sets forth definitions, the identical definitions need not be repeated in the Dig Safe regulations and thus have been deleted.

² Attached hereto as Appendix A is a copy of the Emergency Regulations marked to show the changes incorporated herein. Attached hereto as Appendix B is a clean copy of the Emergency Regulations.

II. DIG SAFE LAW/REGULATION COORDINATION WITH FEDERAL CODE

The Department manages its damage prevention program pursuant to the state Dig Safe law, G.L. c. 82, §§ 40 through 40E, and the state damage prevention regulations, 220 CMR 99.00. These laws and regulations apply to excavators and all utility companies, with exemptions for certain parties and practices.³

Pursuant to 49 U.S.C. § 60105, the Department is also authorized to regulate the federal safety standards and practices for intrastate natural gas pipelines on behalf of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) of the U.S. Department of Transportation. These standards and practices include regulations regarding damage prevention, aimed at both excavators and natural gas operators; they also include regulations regarding the adequacy of the Department’s enforcement of its damage prevention program. See 49 C.F.R. Parts 192, 196, 198.

In 2016, PHMSA conducted its annual adequacy evaluation of the Department’s enforcement of the state damage prevention law, pursuant to 49 U.S.C. § 60114 (regarding one-call notification systems, such as Dig Safe, Inc.) and 49 C.F.R. Part 198 (regarding state damage prevention enforcement programs). In accordance with 49 C.F.R. § 198.55, the Department must be able to demonstrate that it adequately meets the federal criteria that PHMSA uses to assess the effectiveness of the damage prevention enforcement program.

³ For example, the definition of “Company” in G.L. c. 82, § 40 does not include municipal water departments, which means that a municipal water department is not required to mark out its underground facilities pursuant to G.L. c. 82, § 40B, and cannot be found in violation of G.L. c. 82, § 40B if it does not do so.

PHMSA also uses these criteria to evaluate if the Department has the authority to enforce its excavation damage prevention law.

Following its audit, PHMSA noted an area of concern that impacts the adequacy of the Department's damage prevention enforcement. The Dig Safe law does not require a notification to 911 or similar emergency response number if a pipeline facility is damaged and a release of natural gas or hazardous liquid occurs. This notification is a requirement of 49 U.S.C. § 60114, and it is one of the criteria that PHMSA uses to assess the Department's damage prevention program. See 49 C.F.R. § 198.55(a)(6)(iii). If the Department does not amend its damage prevention program in this area by 2021, PHMSA could determine that the Department's program is inadequate and withhold some portion of the Department's federal grant for damage prevention, or could prohibit the Department from enforcing the federal requirements on PHMSA's behalf. See 49 U.S.C. § 60114. To address this issue, the Department incorporates the 911 call requirements into 220 CMR 99.00, thus requiring excavators to call 911 if there is damage to an underground facility and the damage results in the escape of any regulated natural or other gas. Emergency Regulations, 220 CMR 99.07(7).

The Department hereby adopts the proposed revisions as emergency regulations primarily to incorporate the federal minimum safety requirements, set forth in 49 C.F.R. § 192.614 and Part 196, into its regulations and to address the issue that PHMSA has identified.

III. OTHER REVISIONS TO 220 CMR 99.00

In addition to the revisions noted above, the Department adopts further changes to 220 CMR 99.00 for the following reasons: (a) to clarify the obligations of both excavators and utility companies; (b) to establish more efficient procedures for the enforcement of violations; and (c) to correct minor language errors and delete outdated, duplicative, or unnecessary information.

First, the Purpose and Scope section of the current Dig Safe regulation, 220 CMR 99.01(2), states that utility companies shall report all suspected Dig Safe violations to the Department within 30 days of learning of the circumstances constituting the suspected violation. The Department moves this requirement out of the Purpose and Scope section and into the Excavation Section to emphasize that this is an important requirement for every utility company, as it enables the Department to address violations in a timely manner, and may subject utility companies to civil penalties if they do not comply. Emergency Regulations, 220 CMR 99.07(9).

Second, the Department amends the definitions set forth in 220 CMR 99.02 to clarify certain terms, incorporate definitions from the federal code, and eliminate repetition of those definitions that are already contained in G.L. c. 82, § 40. We also call attention to the issue of municipal water companies or departments. As the Department has previously found, the Legislature did not intend municipal water companies to fall within the definition of “Company” for the purposes of the Dig Safe laws and regulations. Rulemaking into Amendment of Dig Safe Regulations, D.P.U. 88-40, at 10-12 (1991). Nevertheless, we

acknowledge that some municipal water companies voluntarily belong to Dig Safe, Inc., and thus mark out their underground facilities in response to excavation notifications. In the interests of pipeline safety, we encourage all municipal water companies to follow suit and partner more closely with excavators and natural gas companies.

Third, the Dig Safe law, G.L. c. 82, § 40A, requires an excavator to premark “not more than 500 feet of the proposed excavation.” To ensure safety and encourage coordination between excavators and utility companies when working on large excavations, the Department adds the following provision to the Premarking section, 220 CMR 99.03:

- (4) For any continuous excavation over 500 feet in length, prior to giving notice to the Dig Safe Center, the excavator shall premark the first 500 feet and the terminus or furthest point of the excavation location for which notice will be given, rather than premarking the entire excavation location. Thereafter, the excavator shall communicate the unmarked perimeter of the excavation to each company owning affected facilities by means of a written description of the excavation site, and shall conduct at least one on-site consultation with each company. The company shall summarize the on-site consultations in writing, and both the company and the excavator shall maintain copies.

In addition, the Department adds the following provision to the Marking Procedures section, 220 CMR 99.06:

- (7) For any continuous excavation over 500 feet in length where premarking is not required, each company owning affected facilities shall mark at least 15 feet beyond the first 500 feet, and mark the terminus or furthest point of the excavation location. The excavator and each company shall agree on the marking schedule for the extent of the excavation site beyond the first 500 feet until the terminus. The company shall summarize the on-site consultations in writing, and both the company and the excavator shall maintain copies.

Fourth, to add greater clarity and structure to the existing regulations, the Department separates the notification procedures for emergency excavations from those of regular

excavations by adding a section solely for Emergency Excavation Notification. Emergency Regulations, 220 CMR 99.05. The Department also adopts new requirements for both excavators and the Dig Safe Center (i.e., Dig Safe, Inc.) to ensure that emergency Dig Safe tickets are requested and issued only for emergency situations. Emergency Regulations, 220 CMR 99.05(2), (3); see also G.L. c. 164, § 76D (authorizing Department to investigate operation of the Dig Safe system). Consistent with these concerns, the Department amends the definition of “Emergency” in 220 CMR 99.02 to clarify that an emergency must be an unanticipated event and not one intended merely to prevent the loss of business or profits. Dig Safe Rulemaking, D.P.U. 86-67, at 5 (1986). The Department also adds a requirement for companies to mark out the location of their facilities within five hours of receiving an emergency notification. Emergency Regulations, 220 CMR 99.05(4).

Fifth, in Dig Safe Rulemaking, D.T.E. 98-109, at 10-11 (1999), the Department had considered a recommendation that companies should be required to remove or at least identify abandoned underground facilities, as they may pose problems to excavators who uncover them and do not know if they are in service or abandoned. The Department stated that the issue was worth further discussion but that the topic was beyond the scope of the proceeding, and so made no finding. D.T.E. 98-109, at 10-11. Having further considered the issue, the Department now clarifies that if a facility has been abandoned or is not in service but falls within the safety zone of an active facility, it shall be marked. Emergency Regulations, 220 CMR 99.06(6). Moreover, in an effort to avoid damage to newly installed lines, the Department adopts a requirement for companies to mark out newly installed

facilities and specifically notify excavators of their installation. Emergency Regulations, 220 CMR 99.06(11).

Sixth, in an effort to clarify when mechanical means may be used within the safety zone, the Department adds the following language to the Excavation Section,

220 CMR 99.07(1):

Notwithstanding G.L. c. 82, § 40C, when excavating within the safety zone, mechanical means may be used only for the removal of layers of bituminous pavement, concrete, or other such materials used as a travel surface, with minimal disturbance of the immediately underlying soil and employing reasonable precautions, so long as non-mechanical means are employed thereafter to avoid damage in locating the underground facility.

The Department incorporates other changes to the Excavation Section to address how long a Dig Safe ticket remains valid, what an excavator must do if it observes an unmarked or abandoned facility, and what an excavator must do if it damages or makes contact with an underground facility (including the required call to 911 discussed above). Emergency Regulations, 220 CMR 99.07(2), (5), (7), (8).

Seventh, the Department adopts changes to the procedures for enforcement of Dig Safe violations. Emergency Regulations, 220 CMR 99.09 through 220 CMR 99.14. In particular, the Department clarifies the procedures, ensures that they comport with current practice, and provides a degree of flexibility for enforcement. Many of the changes correspond with the procedures for enforcement of pipeline safety violations by operators, 220 CMR 69.00.

Eighth, the Department addresses that part of G.L. c. 82, § 40E providing that state and local government bodies are not subject to civil penalties for violations of G.L. c. 82,

§ 40A (initial notice to Dig Safe, Inc.) or § 40C (avoiding damage to underground facilities), and further providing that residential property owners are not subject to civil penalties for failure to premark their own residential properties in accordance with G.L. c. 82, § 40A. Notwithstanding these provisions, the Department clarifies that it may nevertheless issue a notice of probable violation to any state or local government body, or any residential homeowner, for any violation of M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, or 49 C.F.R. Part 192 where the violation involves a natural gas pipeline facility. Emergency Regulations, 220 CMR 99.09(5).

Finally, pursuant to G.L. c. 164, § 105A, the Department adopts changes to the Civil Penalties section, 220 CMR 99.14, to clarify that the Department may impose penalties not only for violations of G.L. c. 82, §§ 40 through 40D, but also for violations of 220 CMR 99.00, 49 C.F.R. § 192.614, or 49 C.F.R. Part 196, insofar as the violation pertains to the safety of natural gas pipeline facilities. Emergency Regulations, 220 CMR 99.14.

Section 105A of G.L. c. 164 provides as follows:

Any person, firm or corporation who violates any provision of any code adopted by the department pertaining to the safety of pipeline facilities and the transportation of gas, or any regulation or rule thereunder, at a time when the department has submitted and has in effect the annual certification to the United States Secretary of Transportation provided for in 49 U.S.C. section 60105 shall be subject to civil penalties as specified in 49 U.S.C. section 60122(a)(1) or any successor statute enacted into federal law for the same purposes as said section 60122(a)(1).

In addition to the Department's authority to enforce G.L. c. 82, §§ 40 through 40E, the Department receives an annual 49 U.S.C. § 60105 certification from PHMSA authorizing it to enforce safety standards and practices for intrastate pipeline facilities or intrastate

pipeline transportation, such as those set forth in 49 C.F.R. Parts 192. Moreover, the Department has promulgated 220 CMR 99.00 to further ensure the safety of pipeline facilities and the transportation of natural gas. Therefore, pursuant to G.L. c. 164, § 105A, the Department has revised the Civil Penalties section of 220 CMR 99.00 to provide that any person, firm, or corporation who violates any of these laws or regulations pertaining to the safety of pipeline facilities and the transportation of gas is subject to the civil penalties specified in 49 U.S.C. § 60122(a)(1). Emergency Regulations, 220 CMR 99.14(1). Section 60122 of 49 U.S.C. authorizes civil penalties up to \$200,000 per violation per day for each related series of violations, up to a maximum of \$2 million. Nevertheless, the Department may consider the lower civil penalties set forth in G.L. c. 82, § 40E (\$1,000 for a first offense, and between \$5,000 and \$10,000 for a subsequent offense occurring within twelve months) when addressing a small excavator's violation, as opposed to a utility company's violation, depending on the circumstances. The Department has also added a provision noting that it may refer certain violators to the Office of Public Safety and Inspections ("OPSI").⁴ Emergency Regulations, 220 CMR 99.14(3).

IV. ADOPTION OF THE REGULATIONS

By this Order, the Department adopts the above-noted revisions to 220 CMR 99.00 as Emergency Regulations. These Emergency Regulations become effective today, upon filing

⁴ In D.P.U. 88-40, at 38-39, the Department had considered a recommendation to implement license sanctions (such as revocation or suspension, in coordination with the OPSI (then under the Department of Public Safety) for certain egregious or reckless conduct, but stated that the issue was beyond the scope of that proceeding.

with the Secretary of the Commonwealth, and they will remain in effect for a period not to exceed three months.

V. SOLICITATION OF COMMENTS

The Department seeks initial written comments on the Emergency Regulations no later than 5:00 p.m. on **Monday, August 26, 2019**. The Department seeks reply written comments on the Emergency Regulations no later than 5:00 p.m. on **Tuesday, September 3, 2019**. Written comments shall be limited to a maximum of ten one-sided, double-spaced typewritten pages.

Any person who desires to file written comments shall file an original and one copy of such written comments with Mark D. Marini, Secretary, Department of Public Utilities, One South Station, Fifth Floor, Boston, Massachusetts, 02110. All documents should also be submitted to the Department in electronic format using one of the following methods: (1) by e-mail attachment to dpu.efiling@mass.gov and the hearing officer, laurie.e.weisman@mass.gov; or (2) on a CD-ROM or USB drive. The text of the e-mail, CD-ROM, or USB drive must specify: (1) the docket number of the proceeding (D.P.U. 19-43); (2) the name of the person or company submitting the filing; and (3) a brief descriptive title of the document. The electronic filing should also include the name, title, and telephone number of a person to contact in the event of questions about the filing. The electronic file name should identify the document, but should not exceed 50 characters in length. Documents filed with the Department will be available for public inspection at its offices during business hours and through our website by looking up the docket by its

number in the docket database at <https://eeaonline.eea.state.ma.us/DPU/Fileroom> (enter “19-43”).

To provide further opportunity for comment, and pursuant to G.L. c. 30A, §§ 2 and 4, and 220 CMR 2.05, the Department will hold a public hearing on **Monday, August 26, 2019**, at 10:00 a.m. at the Department’s offices, One South Station, Fifth Floor, Boston, Massachusetts. The Department’s office is wheelchair accessible. Any person seeking an accommodation to meaningfully participate at the public hearing should contact Laurie Ellen Weisman, Pipeline Safety Division Counsel, at (617) 305-3500 or laurie.e.weisman@mass.gov at least two days prior to the public hearing with requests for such accommodations. Interested persons may present facts, opinions, or arguments relating to the Emergency Regulations at the public hearing.

VI. ORDER

Accordingly, it is

ORDERED: That immediate adoption of the Emergency Regulations attached hereto and designated at 220 CMR 99.00 is necessary in accordance with G.L. c. 30A, § 2; and it is

FURTHER ORDERED: That the Emergency Regulations attached hereto are hereby ADOPTED.

By Order of the Department,

/s/

Matthew H. Nelson, Chair

/s/

Robert E. Hayden, Commissioner

/s/

Cecile M. Fraser, Commissioner

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220 CMR 99.00: PROCEDURES FOR THE DETERMINATION AND ENFORCEMENT OF VIOLATIONS OF SAFETY CODES PERTAINING TO DAMAGE PREVENTION.

Section

99.01: Purpose and Scope

99.02: Definitions

99.03: Premarking

99.04: Excavation Notification

99.05: Emergency Excavation Notification

~~99.05:99.06: Marking Procedures~~

~~99.06:99.07: 99.06:—Excavation~~

99.08: 99.07:—Blasting at Quarries

99.09: Notice of Probable Violation: Commencement of Enforcement Proceedings

~~99.07:99.10: Informal Review~~

~~99.08:99.11: 99.09:—Adjudicatory Hearing~~

~~99.09:99.12: 99.10:—Remedial Orders~~

~~99.10:99.13: 99.11:—Consent Orders~~

99.14: 99.12:—Civil Penalties

99.01: Purpose and Scope

~~(1) — 220 CMR 99.00 defines terms and delineates the duties of those subject to M.G.L. c. 82, §§ 40 through 40E, also known as the "Dig Safe" law. It also establishes the procedures for determining the nature and extent of violations of M.G.L. c. 82, §§ 40 through 40E, the Dig Safe law and the procedures for issuance of a notice of probable violation, a remedial order, codes, regulations, or a consent order with respect to such violations. In addition, 220 CMR 99.00 sets forth the standards used to determine the amount of civil penalties to be imposed.~~

~~Every gas, electric and telephone company, municipal gas rules adopted or electric department, natural gas pipeline company, petroleum or petroleum products pipeline company, private water company and cable television company shall report all suspected violations of M.G.L. c. 82, §§ 40 through 40E to the Department enforced by the Department of Public Utilities (Department) within 30 days of learning of pertaining to damage prevention and the safety of pipeline facilities, including but not limited to 220 CMR 99.00 and the following: the circumstances constituting the suspected violation. Any other person may report a suspected violation of M.G.L. c. 82, §§ 40 through 40E to the federal damage prevention program as set forth in 49 CFR 192.614, including all subsequent amendments; and federal standards for the protection of underground pipelines from excavation activity, as set forth in 49 CFR Part 196, including all subsequent amendments. 220 CMR 99.00 shall apply to violations of these state and federal codes that occur when the Department. All such reports shall be in a form deemed appropriate and necessary by the Department has~~

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submitted and has in effect the annual certification to the United States Secretary of Transportation provided for in 49 U.S.C. § 60105, pursuant to the provisions of M.G.L. c. 164, § 105A.

99.02: Definitions

In addition to the definitions set forth in M.G.L. c. 82, § 40, the following definitions shall apply:

Blasting. Excavation by means of explosives.

Center--Line Method~~shall mean the.~~ The method for identifying the location of an underground facility by placing marks on the surface above and parallel to the center line of the facility.

Company. ~~The same meaning as provided in M.G.L. c. 82, § 40. shall mean natural gas pipeline company, petroleum or petroleum products pipeline company, public utility company, cable television company, and municipal utility company or department that supply gas, electricity, telephone, communication or cable television services or private water companies within the city or town where such excavation is to be made.~~

Damage or Excavation Damage. Any excavation activity that results in the need to repair or replace an underground facility due to a weakening, or the partial or complete destruction, of the underground facility, including, but not limited to, the underground facility, appurtenances to the underground facility, protective coatings, structural or lateral support, corrosion control, or the housing for the line, device, or underground facility.

Department. Department of Public Utilities, Commonwealth of Massachusetts.

Description of Excavation Location. The same meaning as provided in M.G.L. c. 82, § 40.
~~shall include: the name of the city or town where the excavation will take place; and the name of the street, way, or route number where appropriate; and the name of the streets at the nearest intersection to the excavation; and the number of the buildings closest to the excavation; and/or any other description which will accurately define the excavation location, including landmarks and utility pole numbers; and the date and location of any blasting.~~

Dig Safe Center. The underground facility damage prevention system as defined in M.G.L. c. 164, § 76D through which a person can notify companies of planned excavation to facilitate the locating and marking of any underground facilities in the excavation area. See also 220 CMR 99.02, System.

Division. Pipeline Safety Division of the Department.

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~~Emergency shall mean a condition in which the safety of the public is in. A sudden or unexpected occurrence involving a clear and imminent danger, such as a threat to life or health or where demanding immediate correction is required to maintain action to prevent or mitigate loss of, or damage to, life, health, property, or restore essential public utility service.~~ public services, but not including a loss of business or profits.

~~Excavation shall mean. The same meaning as provided in M.G.L. c. 82, § 40—an operation for the purpose of movement or removal of earth, rock or the materials in the ground, including but not limited to, digging, blasting, augering, backfilling, test boring, drilling, pile driving, grading, plowing in, hammering, pulling in, jacking in, trenching, tunneling and demolition of structures, excluding excavation by tools manipulated only by human power for gardening purposes and use of blasting for quarrying purposes.~~

~~Excavator shall mean. Any person or legal entity, public or private, including, but not limited to, a person, partnership, joint venture, trust, corporation, association, public utility, company or state or local government body which performs, proposing to engage or engaging in~~ Excavation operations.

~~Facility shall mean something that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end.~~

Marking. The practice of identifying the location of the center line of the underground facility by the use of color-coded fluid, such as paint, stakes or flags.

Offset Marking. The practice of marking an underground facility by placing marks at locations that parallel to but not on the surface above the center line of the underground facility, noting the distance from the marks to the center line.

~~Person shall mean any.~~ Any individual, firm, joint venture, trust, partnership, corporation, association, cooperative association, or joint stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

Quarry. A site primarily used as a source of mined products from the earth.

~~Premark shall mean to.~~ To delineate the general scope of the excavation or boring on the paved surface of the ground using white paint, or stakes or other suitable white marking on nonpaved surfaces.

~~Safety Zone. The same meaning as provided in M.G.L. c. 82, § 40. shall mean a zone containing the width of the facilities plus not more than 18 inches on each side and designated on the surface by the use of standard color-coded markings.~~

~~Standard Color-Code. d markings shall mean the following colored code which shall be used for the placement of marks:~~

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- (a) Red -- electric power lines, cables, conduit or light cables;
- (b) Yellow -- gas, oil, petroleum, steam or other gaseous materials;
- (c) Orange -- communications cables or conduit, alarm or signal lines;
- (d) Blue -- water, irrigation and slurry lines;
- (e) Green -- sewer and drain lines;
- (f) Purple - reclaimed water such as used for irrigation or slurry lines;
- (g) White ~~premark~~ premarks of proposed excavation-;
- (h) Pink - premarks pursuant to 220 CMR 99.03(2), temporary survey marks, or to distinguish from other color-coded marks.

System ~~shall mean the underground plant damage prevention system. The same meaning as defined~~ provided in

M.G.L. c. 164, § 76D 82, § 40. See also 220 CMR 99.02, Dig Safe Center.

Underground Facility. Any property, such as a pipe, wire, conduit, storm drain, or other manmade structure, which is buried, placed below ground, or submerged on a public way, private property, right-of-way, easement, public street, or other public place and is being used or will be used for the conveyance of cable television, electricity, gas, sewerage, steam, telecommunications, or water.

99.03: Premarking

- (1) Premarking shall occur before ~~Except as provided in 220 CMR 99.03(4), an excavator has given~~ shall premark an excavation site before giving notice of the excavation to the system ~~Dig Safe Center~~.
- (2) When premarking in an area where white marks may interfere with traffic or pedestrian control, or when white marks might otherwise be difficult to see, the excavator ~~should consider using an alternate color, other than a color listed as a standard color code marking under 220 CMR 99.02, and may use pink but~~ must inform the Dig Safe Center ~~in so that~~ the notice indicates that ~~an alternate color~~ pink has been used for premarking.
- (3) When excavating to replace a guardrail or fence, an excavator may use the pre-existing guardrail or fence as the premark-, but the notice must contain a description of the excavation location sufficient to inform a company of the area to be excavated. If the new guardrail is not collinear with the pre-existing guardrail or fence, the excavator must premark only that area to be excavated that will differ from the pre-existing guardrail or fence.
- (4) 99.04: For any continuous excavation over 500 feet in length, prior to giving notice to the Dig Safe Center, the excavator shall premark the first 500 feet and

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the terminus or furthest point of the excavation location for which notice will be given, rather than premarking the entire excavation location. Thereafter, the excavator shall communicate the unmarked perimeter of the excavation to each company owning affected facilities by means of a written description of the excavation site, and shall conduct at least one on-site consultation with each company. The company shall summarize the on-site consultations in writing, and both the company and the excavator shall maintain copies.

99.04: Excavation Notification

- (1) Notice of ~~aan~~ excavation shall be tendered to the ~~system~~Dig Safe Center at least 72 hours, exclusive of Saturdays, Sundays ~~or, and legal~~ holidays, but not more than 30 days prior to the commencement of an excavation. Such notice shall include ~~aan accurate~~ description of the excavation location and the ~~date~~scope of the excavation is expected work to ~~begin~~be performed.
- (2) Notice of an excavation by blasting shall be tendered to the Dig Safe Center at least 72 hours in advance and shall accurately specify the date and location of such blasting. In the case of an unanticipated obstruction requiring blasting, notice shall be given not less than four hours prior to such blasting.

99.05: Emergency Excavation Notification

- ~~(2)~~(1) In an emergency, ~~the an~~ excavator may commence excavating after having taken all reasonable steps and precautions, consistent with the ~~emergency, to urgency of the situation, and premarked the site. The excavator shall~~ notify the ~~system and premark the excavation site.~~Dig Safe Center at the earliest practicable moment, including a description of the excavation location and the work to be done.
- (2) No excavator shall indicate to the Dig Safe Center or to a company that an event constitutes an emergency unless the excavator believes in good faith that the circumstances constitute an emergency as defined in 220 CMR 99.02.
- (3) The Dig Safe Center shall not issue an emergency dig safe permit unless it believes in good faith that the circumstances constitute an emergency as defined in 220 CMR 99.02.
- ~~(3)~~(4) Each company shall establish standard operating procedures to ~~identify~~mark the location of its respective underground facilities as soon as practicable but no more than five hours after receiving notification of an emergency excavation whether or not the excavation has begun.
- ~~(4)~~(5) Circumstances requiring emergency excavation shall not excuse the excavator from the requirement to use all reasonable means and precautions to avoid damage to an underground facility and to otherwise comply with all requirements of M.G.L. c. 82, §§ 40 through 40D and 220 CMR 99.00.

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- ~~(5)(6)~~ The excavator shall provide notice to the Dig Safe markings are invalid after the cessation of Center when the emergency has been brought to conclusion. Thereafter, if further excavation at the location shall require notice as set forth to be done beyond the area that was marked pursuant to the emergency notification, the excavator shall so notify the Dig Safe Center in accordance with 220 CMR 99.04(1) and premarking.
- ~~(6)(7)~~ In no event shall any excavation by blasting take place unless notice thereof, either in the initial notice or a subsequent notice accurately specifying the date and location of such blasting, shall have been given and received at least 72 hours in advance, except in the the case of an unanticipated obstruction emergency requiring blasting when such notice shall be not less than four hours prior to such blasting. If any such notice cannot be given as aforesaid because of an emergency requiring blasting, it shall be given, an excavator shall give notice to the Dig Safe Center and to the local gas company as soon as may be practicable but before any explosives are discharged.

~~99.05:—99.06: Marking Procedures~~

- ~~(1) — Every company shall use the center line method to identify the location of its respective underground facilities. The underground facility shall be completely located within a safety zone no more than 18 inches plus the width of the facility from the designated center line.~~
- ~~(2) — All markings shall indicate, where practicable, the width, if it is greater than two inches, and material of the underground facility, as well as any change in direction and any terminus points of the facility.~~
- ~~(3) — Marking shall extend at least 15 feet beyond the boundaries of the premarked area.~~
- (1) Within 72 hours, exclusive of Saturdays, Sundays and legal holidays, from the time initial notice is received by the system or at such time as the company and excavator agree Dig Safe Center, every company shall mark the location of an underground facility by applying a visible fluid marking material, such as paint, on the ground above the facility. The company may use an alternative marking method of color-coded stakes, color-coded flags or color-coded brush-type markers.
- (2) Every company shall use the center-line method to identify the location of its respective underground facilities, whether the facilities are located on private or public property. The underground facility shall be completely located within the safety zone, no more than the width of the facility plus 18 inches on each side from the designated center line.

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- (3) All markings shall indicate, where practicable, the width, if it is greater than two inches, and the material of the underground facility, as well as any change in direction and any terminus points of the facility.
- (4) The standard color code listed in 220 CMR 99.02 shall be used for the placement of marks whether by visible marking material or alternative marking methods.
- (5) Marking shall extend at least 15 feet beyond the boundaries of the premarked area, if premarking is required.
- (6) Any facility that has been abandoned or is not in service shall also be marked if it falls within the safety zone of an active facility, and shall further be marked so as to indicate its status as abandoned or not in service.
- (7) For any continuous excavation over 500 feet in length where premarking is not required, each company owning affected facilities shall mark at least 15 feet beyond the first 500 feet, and mark the terminus or furthest point of the excavation location. The excavator and each company shall agree on the marking schedule for the extent of the excavation site beyond the first 500 feet until the terminus. The company shall summarize the on-site consultations in writing, and both the company and the excavator shall maintain copies.
- ~~(2)(8)~~ Upon a request for remarking, the company shall remark the location of an underground facility within 24 hours of the request, exclusive of Saturdays, Sundays and legal holidays.
- ~~(3)(9)~~ In a paved area designated as a historical location, a company may use chalk, stakes, flags, brush-type markers or other suitable devices with the appropriate color-coding affixed or attached, instead of marking fluid. If an alternative marking method is used, the excavator shall communicate as necessary with the company to ensure that the marks are maintained and remarked as needed. The color code listed under 220 CMR 99.02 shall be used for the placement of marks whether by visible fluid or alternative marking methods.
- ~~(4)(10)~~ If the surface above the underground facility is to be removed, the company may place supplemental offset marks. These marks must be uniformly aligned and must indicate the specific distance from the markings to the underground facility.

 - ~~(4)~~ After a company has marked the location of its facilities, the excavator shall be responsible for maintaining the markings at such locations unless such excavator, after premarking, requests remarking at the location due to the obliteration, destruction or other removal of such markings. The company shall then remark such location within 24 hours following receipt of such request.
- (11) Upon installing any new underground facilities or part thereof, a company shall mark out the location of the newly installed facilities as they are backfilled or

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installed, and shall notify excavators with a valid Dig Safe ticket working in the area of the newly installed facilities.

~~(5)~~ — Markings shall be valid for an excavation site until one of the following events occurs:

~~(a)~~ — unless the excavation does not commence within 30 days of the notification;

~~(b)~~ — the markings become faded, illegible or destroyed;

~~(c)~~ — a company installs new underground facilities in a marked area still under excavation; and/or

~~(d)~~ — an emergency condition is brought to conclusion, at which nullifies any markings installed duringtime the emergency.

~~(12)~~ When excavating in close proximity to the underground facilities of any company, nonmechanical means excavator shall be employed, as necessary, to avoid damage in locating such facility, notify the Dig Safe Center and any further request a new Dig Safe ticket in order to commence excavation.

~~(13)~~ If a company is aware that an excavation shall be performed employing reasonable precautions to avoid damage to any site includes privately owned underground facilities including, but not limited to, any substantial weakening of structural or lateral support of such, the company shall so inform the excavator or otherwise indicate the presence of such privately owned facilities, penetration or destruction of any pipe, main, wire or conduit or the protective coating thereof, or damage to any pipe, main, wire or conduit. In such cases but need not mark them.

99.07: Excavation

~~(5)~~(1) When excavating within the safety zone, mechanical means may only be used only for the initial penetrationremoval of layers of bituminous pavement, rockconcrete, or other such materials used as a travel surface, with minimal disturbance of the immediately underlying soil and employing reasonable precautions, so long as non-mechanical means are employed thereafter to avoid damage in locating the underground facility.

~~after the paving, rock or other such material has been penetrated.~~

~~(2)~~ A Dig Safe ticket shall be valid for as long as the markings remain clear and discernible. The excavator is responsible for maintaining the markings or placing offset marks, using the standard color codes noted in 220 CMR 99.02, or contacting the Dig Safe Center to request remarking.

~~(3)~~ If an excavator damagesrequests remarking, it shall suspend the excavation for 24 hours.

~~(4)~~ If the excavator and a company'scompany agree to make any changes to the original excavation as specified in the Dig Safe ticket, the excavator shall notify the Dig Safe Center and request a new Dig Safe ticket.

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- (5) If an excavator observes clear evidence of the presence of an unmarked underground facility, or has reason to believe that a company's in the area of the proposed excavation or during the excavation, the excavator shall not begin excavating until notifying the Dig Safe Center and shall protect the facility.
- (6) An excavator shall not remove an abandoned underground facility may be damaged or compromised in any way as a result of the excavator's actions, the excavator without first receiving authorization and direction from the company owning the facility, and shall remove only that portion of the facility to the terminus as marked.
- (7) When an excavator causes any damage to an underground facility, the excavator shall:
- (a) Call 911 immediately if the damage results in the escape of any regulated natural or other gas;
 - (b) Evacuate nearby structures if necessary;
 - (c) Report the damage to the facility owner or operator at the earliest practical moment following discovery of the damage;
 - (d) Attempt no repairs, unless directed to by the facility owner or operator;
 - (e) Call 811 or otherwise notify the Dig Safe Center; and
 - (f) Report the damage to the Department.
- (6)(8) Any person who makes contact with any underground facility must notify the company owning the facility at the earliest practical moment following such contact.
- ~~company as soon as possible.~~
- (9) 99.07:—Every company having knowledge or reason to know of any damage to an underground facility or violation of M.G.L. c. 82, §§ 40 through 40D or 220 CMR 99.00 shall report such damage or violation to the Department within 30 days of learning of the circumstances. Any other person may report damage or a suspected violation to the Department. All such reports shall be in a form deemed necessary and appropriate by the Department.

99.08: Blasting at Quarries

- (1) A blasting operation within a quarry whose property lines are 500 feet or less from a natural gas pipeline or metering or regulation station requires written approval by the Department, pursuant to St. 2014, c. 149, § 7. The Department may designate such approval to the Division.
- (2) A written request for such approval shall be tendered to the Division prior to the blasting operation in a manner deemed necessary and appropriate by the Department.
- (3) After receiving written approval, and prior to any blasting operation, a blaster shall provide further notice of the blasting operation to the Division in a manner deemed appropriate and necessary by the Department.

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~~99.06:—99.09:~~ Notice of Probable Violation: Commencement of Enforcement Proceedings

(1) The Department or its designee may begin ~~an enforcement~~ proceeding by issuing a notice of probable violation (NOPV) if the Department or its designee has reason to believe that a violation of M.G.L. c. 82, §§ 40 through ~~40E40D,~~ 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196 has occurred or is occurring. ~~The NOPV shall be issued by the Commission or its designee.~~ The NOPV shall ~~state the factual basis for the allegation of a violation and the amount of the civil penalty which may be assessed against the person served ("respondent") if the Department finds that the violation has occurred.~~ The NOPV shall state specify the section of the statute or regulation that the respondent has a right to reply in writing to the NOPV or to appear at an informal conference with the Department on a designated day which is at least 21 days from the date of the NOPV. ~~is alleged to have violated, the factual basis for the allegation, the response options available to the respondent under 220 CMR 99.09(2), the amount of the proposed civil penalty, and the maximum civil penalty for which the respondent may be liable under the law.~~

(2) ~~Any written reply must be filed~~ Within 30 days of the date of an NOPV, the respondent shall either:

(a) Pay the proposed civil penalty by check or money order made payable to the Commonwealth of Massachusetts, and submit it to the Division with a signed consent order pursuant to 220 CMR 99.13;

~~(a)~~(b) Submit to the Department on or before ~~Division~~ a written response to the day scheduled for ~~allegations in the informal conference and must~~ NOPV. The response should be signed by the respondent or the respondent's designee. It must ~~respondent's duly authorized representative and include a complete statement of all relevant facts and authority, and full description of,~~ respondent's duly authorized representative and include a complete statement of all relevant facts and authority, and full description of, along with any relevant documents, in response to the reasons that the respondent disputes the violation alleged ~~allegations in the NOPV;~~ or

~~(1) If the respondent or the respondent's representative fails, without good cause, either to file a written reply or to appear at the informal conference, the respondent shall be deemed to have admitted the accuracy of the factual allegations and legal conclusions stated in the NOPV, and the respondent shall be held liable to pay the civil penalty designated in the NOPV through the issuance of a remedial order pursuant to 220 CMR 99.10.~~

99.08: Informal Review

~~(1) An informal review shall be conducted by an investigator designated by the Commission. The informal review shall consist of an informal conference, if the respondent has chosen this option under 220 CMR 99.07, or an analysis of the respondent's written reply.~~

(c) Contact the Division to confirm attendance at an informal conference.

~~(2)~~(3) At the informal conference, the respondent shall have the right to be represented by an attorney or other person, and shall have the right to present relevant

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documents in response to the investigator's allegations in the NOPV. The investigator designated by the Department to conduct the informal conference shall make available to the respondent any evidence which indicates that the respondent may have committed the violations alleged in the NOPV, and the respondent shall have the opportunity to rebut this evidence. The informal conference shall not be construed to be an adjudicatory proceeding for purposes of M.G.L. c. 30A.~~violated~~

- (4) Failure of the respondent to respond to the NOPV in accordance with 220 CMR 99.09(2) constitutes a waiver of respondent's right to contest the allegations in the NOPV and authorizes the Department, without further notice to the respondent, to find the facts to be as alleged in the NOPV and to issue a remedial order pursuant to 220 CMR 99.12.
- (5) The Department or its designee may issue an NOPV to any state or local government body, or any residential homeowner, for any violation of M.G.L. c. 82, §§ 40 through 40E and the respondent or the respondent's representative shall have the opportunity to rebut this evidence. However, this 40D, 220 CMR 99.00, or 49 CFR Part 192 where the violation involves a natural gas pipeline facility.

99.10: Informal Review and Decision

- (1) Following an informal conference shall not be construed to be an adjudicatory proceeding as defined in M.G.L. c. or receipt of a written reply to the NOPV, the investigator shall conduct an informal review of all relevant evidence and make a recommendation to the Division director. If the evidence indicates reason to believe that the respondent has violated M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196 in a respect not stated in the NOPV, the Division shall issue a new or revised NOPV with respect to that allegation.
- (2) If the evidence supports a finding that the respondent committed the violations as alleged in the NOPV, the Division shall issue a written decision in writing, which will be sent to the respondent by mail, return receipt requested. If the respondent specifying the section of the statute or regulation violated, the factual basis for the violation, the amount of the civil penalty, any corrective action deemed appropriate, and the response options available to the respondent.
- (3) If the respondent is not satisfied with the informal review decision, the respondent may request an adjudicatory hearing, provided that such under 220 CMR 99.11 by submitting a written request is made in writing to the Department Secretary within ten 14 days of the date of receipt of the decision. Failure of the respondent to request an adjudicatory hearing will be deemed an admission of the factual allegations and legal conclusions stated in the investigator's within 14 days constitutes a waiver of respondent's right to contest the decision, and authorizes the Department, without further notice to the respondent shall be held,

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to hold the respondent liable to pay the civil penalty designated in the ~~investigator's~~ decision through the issuance of a remedial order under 220 CMR 99.10.12.

~~99.07:–99.11:~~ 99.09:–Adjudicatory Hearing

- (1) The adjudicatory hearing shall be a *de novo* hearing and shall be an adjudicatory proceeding as defined in M.G.L. c. 30A, and conducted pursuant to 220 CMR 1.00: *Procedural Rules*.
- (2) At the adjudicatory hearing, the respondent ~~shall have the right to~~ must be represented by an attorney, unless the respondent is an individual representing him or other person herself.
- (3) If the Department finds, after the adjudicatory hearing, that the respondent has violated M.G.L. c. 82, §§ 40 through ~~40E40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196,~~ it may issue a remedial order pursuant to 220 CMR 99.10.12.
- (4) If the Division determines, or the Department finds, after the request for an adjudicatory ~~decision~~ hearing has been filed, that the evidence ~~supports a determination~~ indicates reason to believe that the respondent violated M.G.L. c. 82, §§ 40 through ~~40E40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196~~ in a respect not stated in the NOPV or informal review decision ~~of the investigator,~~ the Division shall issue ~~an~~ a new NOPV with respect to the violation so determined or found.

~~99.08:–99.12:~~ 99.10:–Remedial Orders

- (1) If the Department finds that a violation has occurred or is continuing, it may issue a remedial order. The remedial order shall include a written opinion setting forth the factual and legal basis of the Department's findings and shall direct any party to take any action which is consistent with said party's obligations under M.G.L. c. 82, §§ 40 through ~~40E40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196,~~ including the payment of a civil penalty ~~as provided by said statute.~~
- (2) A remedial order issued by the Department under 220 CMR 99.10.12 shall be effective upon issuance, in accordance with its terms, unless stayed, suspended, modified or rescinded.
- (3) A remedial order is a final decision of the Department within the meaning of M.G.L. c. 25, § 5, and thereby subject to review by the Supreme Judicial Court.
- (4) If the respondent fails either to appeal a remedial order to the Supreme Judicial Court pursuant to M.G.L. 25, § 5, or to comply fully with the order within 20 days, the Department may refer the case to the Attorney General with a request

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that an action be brought in the Superior Court to seek appropriate relief, including, but not limited to, collection of assessed penalties.

~~99.09: 99.13:~~ 99.11: Consent Orders

- (1) Notwithstanding any other provision to the contrary, the Department or its designee may at any time resolve an outstanding enforcement issue/proceeding with a consent order. A consent order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement with the terms therein. A consent order need not constitute an admission by any person that a violation has occurred.
- (2) A consent order is a final order of the Department, having the same force and effect as a remedial order issued pursuant to 220 CMR 99.~~40~~12.
- (3) A consent order shall not be appealable by the respondent and shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Department.

~~99.10: 99.14:~~ 99.12: Civil Penalties

(1) Any Damage to Natural Gas Pipeline Facilities.

- (a) Pursuant to M.G.L. c. 164, § 105A, any person, ~~contractor,~~ excavator or company found by the Department to have violated ~~any provision of the Dig Safe law or regulation adopted by the Department~~ M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196 in relation to a natural gas pipeline facility when the Department has submitted and has in effect the annual certification to the United States Secretary of Transportation provided for in 49 U.S.C. § 60105 shall be subject to a civil ~~penalty not to exceed \$~~penalties as specified in 49 U.S.C. § 60122(a)(~~1,000 for the first offense, and not less than \$5,000 nor more than \$10,000 for any subsequent offense. On a subsequent offense, if a respondent demonstrates a period of 12 consecutive months within which the Department has not found the respondent in violation of the Dig Safe law, the Department shall cite respondent the first offense civil penalty of \$1,000.~~).
- (b) In determining the amount of the civil penalty, the Department shall consider the following criteria, set forth in 49 CFR 190.225:
 1. The nature, circumstances and gravity of the violation; ~~the,~~ including adverse impact on the environment;
 2. The degree of the ~~the~~ respondent's culpability; ~~the~~
 3. The respondent's history of prior offenses;
 4. Any good faith by the respondent in attempting to achieve compliance; and
 5. The effect on the ~~the~~ respondent's ~~level of cooperation with~~ability to continue in business.

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- (c) The Department may also consider the following criteria set forth in 49 CFR 190.225:
1. The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and
 2. Such other matters as justice may require.
- (2) Damage to Facilities Other Than Natural Gas Pipelines.
- (a) Any person, excavator or company found by the Department to have violated M.G.L. c. 82, §§ 40 through 40D or 220 CMR 99.00 in relation to a facility other than a natural gas pipeline facility shall be subject to a civil penalty as specified in M.G.L. c. 82, § 40E.
- (b) In determining the amount of the civil penalty, the Department shall consider to the requirements/criteria set forth in M.G.L. c. 164, § 105A, including the following: the appropriateness of the penalty to the size of the business of 220 CMR 99.00 the person, firm, or corporation charged, the gravity of the violation, and the good faith of the person, firm, or corporation charged in attempting to achieve compliance after notification of a violation.
- (3) The Department may, at its discretion, refer damage prevention matters to the Office of Public Safety and Inspections.

REGULATORY AUTHORITY

220 CMR 99.00: 49 U.S.C. §§ 60105, 60114; 49 CFR Parts 192, 196, 198; M.G.L.-c.-82, §§ 40 through 40E; M.G.L. c. 164, §§, §§ 66, 76, 76C, 76D-, 105A.

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220 CMR 99.00: PROCEDURES FOR THE DETERMINATION AND ENFORCEMENT OF VIOLATIONS OF SAFETY CODES PERTAINING TO DAMAGE PREVENTION.

Section

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99.01: Purpose and Scope

220 CMR 99.00 defines terms and delineates the duties of those subject to M.G.L. c. 82, §§ 40 through 40E, also known as the "Dig Safe" law. It also establishes the procedures for determining the nature and extent of violations of the Dig Safe law and of codes, regulations, or rules adopted or enforced by the Department of Public Utilities (Department) pertaining to damage prevention and the safety of pipeline facilities, including but not limited to 220 CMR 99.00 and the following: the federal damage prevention program as set forth in 49 CFR 192.614, including all subsequent amendments; and federal standards for the protection of underground pipelines from excavation activity, as set forth in 49 CFR Part 196, including all subsequent amendments. 220 CMR 99.00 shall apply to violations of these state and federal codes that occur when the Department has submitted and has in effect the annual certification to the United States Secretary of Transportation provided for in 49 U.S.C. § 60105, pursuant to the provisions of M.G.L. c. 164, § 105A.

99.02: Definitions

In addition to the definitions set forth in M.G.L. c. 82, § 40, the following definitions shall apply:

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Blasting. Excavation by means of explosives.

Center-Line Method. The method for identifying the location of an underground facility by placing marks on the surface above and parallel to the center line of the facility.

Company. The same meaning as provided in M.G.L. c. 82, § 40.

Damage or Excavation Damage. Any excavation activity that results in the need to repair or replace an underground facility due to a weakening, or the partial or complete destruction, of the underground facility, including, but not limited to, the underground facility, appurtenances to the underground facility, protective coatings, structural or lateral support, corrosion control, or the housing for the line, device, or underground facility.

Department. Department of Public Utilities, Commonwealth of Massachusetts.

Description of Excavation Location. The same meaning as provided in M.G.L. c. 82, § 40.

Dig Safe Center. The underground facility damage prevention system as defined in M.G.L. c. 164, § 76D through which a person can notify companies of planned excavation to facilitate the locating and marking of any underground facilities in the excavation area. *See also* 220 CMR 99.02, System.

Division. Pipeline Safety Division of the Department.

Emergency. A sudden or 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, but not including a loss of business or profits.

Excavation. The same meaning as provided in M.G.L. c. 82, § 40.

Excavator. Any person or legal entity, public or private, including, but not limited to, a company or state or local government body, proposing to engage or engaging in Excavation.

Marking. The practice of identifying the location of the center line of the underground facility by the use of color-coded fluid, such as paint, stakes or flags.

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Offset Marking. The practice of marking an underground facility by placing marks at locations that parallel to but not on the surface above the center line of the underground facility, noting the distance from the marks to the center line.

Person. Any individual, firm, joint venture, trust, partnership, corporation, association, cooperative association, or joint stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

Quarry. A site primarily used as a source of mined products from the earth.

Premark. To delineate the general scope of the excavation or boring on the paved surface of the ground using white paint, or stakes or other suitable white marking on nonpaved surfaces.

Safety Zone. The same meaning as provided in M.G.L. c. 82, § 40.

Standard Color-Code.

- (a) Red - electric power lines, cables, conduit or light cables;
- (b) Yellow - gas, oil, petroleum, steam or other gaseous materials;
- (c) Orange - communications cables or conduit, alarm or signal lines;
- (d) Blue - water, irrigation and slurry lines;
- (e) Green - sewer and drain lines;
- (f) Purple - reclaimed water such as used for irrigation or slurry lines;
- (g) White - premarks of proposed excavation;
- (h) Pink - premarks pursuant to 220 CMR 99.03(2), temporary survey marks, or to distinguish from other color-coded marks.

System. The same meaning as provided in M.G.L. c. 82, § 40. *See also* 220 CMR 99.02, Dig Safe Center.

Underground Facility. Any property, such as a pipe, wire, conduit, storm drain, or other manmade structure, which is buried, placed below ground, or submerged on a public way, private property, right-of-way, easement, public street, or other public place and is being used or will be used for the conveyance of cable television, electricity, gas, sewerage, steam, telecommunications, or water.

99.03: Premarking

- (1) Except as provided in 220 CMR 99.03(4), an excavator shall premark an excavation site before giving notice of the excavation to the Dig Safe Center.
- (2) When premarking in an area where white marks may interfere with traffic or pedestrian control, or when white marks might otherwise be difficult to see,

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the excavator may use pink but must inform the Dig Safe Center so that the notice indicates that pink has been used for premarking.

- (3) When excavating to replace a guardrail or fence, an excavator may use the pre-existing guardrail or fence as the premark, but the notice must contain a description of the excavation location sufficient to inform a company of the area to be excavated. If the new guardrail is not collinear with the pre-existing guardrail or fence, the excavator must premark only that area to be excavated that will differ from the pre-existing guardrail or fence.
- (4) For any continuous excavation over 500 feet in length, prior to giving notice to the Dig Safe Center, the excavator shall premark the first 500 feet and the terminus or furthest point of the excavation location for which notice will be given, rather than premarking the entire excavation location. Thereafter, the excavator shall communicate the unmarked perimeter of the excavation to each company owning affected facilities by means of a written description of the excavation site, and shall conduct at least one on-site consultation with each company. The company shall summarize the on-site consultations in writing, and both the company and the excavator shall maintain copies.

99.04: Excavation Notification

- (1) Notice of an excavation shall be tendered to the Dig Safe Center at least 72 hours, exclusive of Saturdays, Sundays, and legal holidays, but not more than 30 days prior to the commencement of an excavation. Such notice shall include an accurate description of the excavation location and the scope of the work to be performed.
- (2) Notice of an excavation by blasting shall be tendered to the Dig Safe Center at least 72 hours in advance and shall accurately specify the date and location of such blasting. In the case of an unanticipated obstruction requiring blasting, notice shall be given not less than four hours prior to such blasting.

99.05: Emergency Excavation Notification

- (1) In an emergency, an excavator may commence excavating after having taken all reasonable steps and precautions, consistent with the urgency of the situation, and premarked the site. The excavator shall notify the Dig Safe Center at the earliest practicable moment, including a description of the excavation location and the work to be done.
- (2) No excavator shall indicate to the Dig Safe Center or to a company that an event constitutes an emergency unless the excavator believes in good faith that the circumstances constitute an emergency as defined in 220 CMR 99.02.

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- (3) The Dig Safe Center shall not issue an emergency dig safe permit unless it believes in good faith that the circumstances constitute an emergency as defined in 220 CMR 99.02.
- (4) Each company shall establish standard operating procedures to mark the location of its respective underground facilities as soon as practicable but no more than five hours after receiving notification of an emergency excavation whether or not the excavation has begun.
- (5) Circumstances requiring emergency excavation shall not excuse the excavator from the requirement to use all reasonable means and precautions to avoid damage to an underground facility and to otherwise comply with all requirements of M.G.L. c. 82, §§ 40 through 40D and 220 CMR 99.00.
- (6) The excavator shall provide notice to the Dig Safe Center when the emergency has been brought to conclusion. Thereafter, if further excavation is to be done beyond the area that was marked pursuant to the emergency notification, the excavator shall so notify the Dig Safe Center in accordance with 220 CMR 99.04.
- (7) In the case of an emergency requiring blasting, an excavator shall give notice to the Dig Safe Center and to the local gas company as soon as practicable but before any explosives are discharged.

99.06: Marking Procedures

- (1) Within 72 hours, exclusive of Saturdays, Sundays and legal holidays, from the time initial notice is received by the Dig Safe Center, every company shall mark the location of an underground facility by applying a visible marking material, such as paint, on the ground above the facility. The company may use an alternative marking method of color-coded stakes, color-coded flags or color-coded brush-type markers.
- (2) Every company shall use the center-line method to identify the location of its respective underground facilities, whether the facilities are located on private or public property. The underground facility shall be completely located within the safety zone, no more than the width of the facility plus 18 inches on each side from the designated center line.
- (3) All markings shall indicate, where practicable, the width, if it is greater than two inches, and the material of the underground facility, as well as any change in direction and any terminus points of the facility.

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- (4) The standard color code listed in 220 CMR 99.02 shall be used for the placement of marks whether by visible marking material or alternative marking methods.
- (5) Marking shall extend at least 15 feet beyond the boundaries of the premarked area, if premarking is required.
- (6) Any facility that has been abandoned or is not in service shall also be marked if it falls within the safety zone of an active facility, and shall further be marked so as to indicate its status as abandoned or not in service.
- (7) For any continuous excavation over 500 feet in length where premarking is not required, each company owning affected facilities shall mark at least 15 feet beyond the first 500 feet, and mark the terminus or furthest point of the excavation location. The excavator and each company shall agree on the marking schedule for the extent of the excavation site beyond the first 500 feet until the terminus. The company shall summarize the on-site consultations in writing, and both the company and the excavator shall maintain copies.
- (8) Upon a request for remarking, the company shall remark the location of an underground facility within 24 hours of the request, exclusive of Saturdays, Sundays and legal holidays.
- (9) In a paved area designated as a historical location, a company may use chalk, stakes, flags, brush-type markers or other suitable devices with the appropriate color-coding affixed or attached, instead of marking fluid. If an alternative marking method is used, the excavator shall communicate as necessary with the company to ensure that the marks are maintained and remarked as needed.
- (10) If the surface above the underground facility is to be removed, the company may place supplemental offset marks. These marks must be uniformly aligned and must indicate the specific distance from the markings to the underground facility.
- (11) Upon installing any new underground facilities or part thereof, a company shall mark out the location of the newly installed facilities as they are backfilled or installed, and shall notify excavators with a valid Dig Safe ticket working in the area of the newly installed facilities.
- (12) Markings shall be valid for an excavation site unless the excavation does not commence within 30 days of the notification, at which time the excavator shall notify the Dig Safe Center and request a new Dig Safe ticket in order to commence excavation.

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- (13) If a company is aware that an excavation site includes privately owned underground facilities, the company shall so inform the excavator or otherwise indicate the presence of such privately owned facilities, but need not mark them.

99.07: Excavation

- (1) When excavating within the safety zone, mechanical means may be used only for the removal of layers of bituminous pavement, concrete, or other such materials used as a travel surface, with minimal disturbance of the immediately underlying soil and employing reasonable precautions, so long as non-mechanical means are employed thereafter to avoid damage in locating the underground facility.
- (2) A Dig Safe ticket shall be valid for as long as the markings remain clear and discernible. The excavator is responsible for maintaining the markings or placing offset marks, using the standard color codes noted in 220 CMR 99.02, or contacting the Dig Safe Center to request remarking.
- (3) If an excavator requests remarking, it shall suspend the excavation for 24 hours.
- (4) If the excavator and a company agree to make any changes to the original excavation as specified in the Dig Safe ticket, the excavator shall notify the Dig Safe Center and request a new Dig Safe ticket.
- (5) If an excavator observes clear evidence of the presence of an unmarked underground facility in the area of the proposed excavation or during the excavation, the excavator shall not begin excavating until notifying the Dig Safe Center and shall protect the facility.
- (6) An excavator shall not remove an abandoned underground facility without first receiving authorization and direction from the company owning the facility, and shall remove only that portion of the facility to the terminus as marked.
- (7) When an excavator causes any damage to an underground facility, the excavator shall:
 - (a) Call 911 immediately if the damage results in the escape of any regulated natural or other gas;
 - (b) Evacuate nearby structures if necessary;
 - (c) Report the damage to the facility owner or operator at the earliest practical moment following discovery of the damage;
 - (d) Attempt no repairs, unless directed to by the facility owner or operator;
 - (e) Call 811 or otherwise notify the Dig Safe Center; and

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- (f) Report the damage to the Department.
- (8) Any person who makes contact with any underground facility must notify the company owning the facility at the earliest practical moment following such contact.
- (9) Every company having knowledge or reason to know of any damage to an underground facility or violation of M.G.L. c. 82, §§ 40 through 40D or 220 CMR 99.00 shall report such damage or violation to the Department within 30 days of learning of the circumstances. Any other person may report damage or a suspected violation to the Department. All such reports shall be in a form deemed necessary and appropriate by the Department.

99.08: Blasting at Quarries

- (1) A blasting operation within a quarry whose property lines are 500 feet or less from a natural gas pipeline or metering or regulation station requires written approval by the Department, pursuant to St. 2014, c. 149, § 7. The Department may designate such approval to the Division.
- (2) A written request for such approval shall be tendered to the Division prior to the blasting operation in a manner deemed necessary and appropriate by the Department.
- (3) After receiving written approval, and prior to any blasting operation, a blaster shall provide further notice of the blasting operation to the Division in a manner deemed appropriate and necessary by the Department.

99.09: Notice of Probable Violation: Commencement of Enforcement Proceedings

- (1) The Department or its designee may begin an enforcement proceeding by issuing a notice of probable violation (NOPV) if the Department or its designee has reason to believe that a violation of M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196 has occurred or is occurring. The NOPV shall specify the section of the statute or regulation that the respondent is alleged to have violated, the factual basis for the allegation, the response options available to the respondent under 220 CMR 99.09(2), the amount of the proposed civil penalty, and the maximum civil penalty for which the respondent may be liable under the law.
- (2) Within 30 days of the date of an NOPV, the respondent shall either:
 - (a) Pay the proposed civil penalty by check or money order made payable to the Commonwealth of Massachusetts, and submit it to the Division with a signed consent order pursuant to 220 CMR 99.13;

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- (b) Submit to the Division a written response to the allegations in the NOPV. The response should be signed by the respondent or the respondent's duly authorized representative and include a complete statement of all relevant facts, along with any relevant documents, in response to the allegations in the NOPV; or
 - (c) Contact the Division to confirm attendance at an informal conference.
- (3) At the informal conference, the respondent shall have the right to be represented by an attorney or other person, and shall have the right to present relevant documents in response to the allegations in the NOPV. The investigator designated by the Department to conduct the informal conference shall make available to the respondent any evidence which indicates that the respondent may have committed the violations alleged in the NOPV, and the respondent shall have the opportunity to rebut this evidence. The informal conference shall not be construed to be an adjudicatory proceeding for purposes of M.G.L. c. 30A.
 - (4) Failure of the respondent to respond to the NOPV in accordance with 220 CMR 99.09(2) constitutes a waiver of respondent's right to contest the allegations in the NOPV and authorizes the Department, without further notice to the respondent, to find the facts to be as alleged in the NOPV and to issue a remedial order pursuant to 220 CMR 99.12.
 - (5) The Department or its designee may issue an NOPV to any state or local government body, or any residential homeowner, for any violation of M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, or 49 CFR Part 192 where the violation involves a natural gas pipeline facility.

99.10: Informal Review and Decision

- (1) Following an informal conference or receipt of a written reply to the NOPV, the investigator shall conduct an informal review of all relevant evidence and make a recommendation to the Division director. If the evidence indicates reason to believe that the respondent has violated M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196 in a respect not stated in the NOPV, the Division shall issue a new or revised NOPV with respect to that allegation.
- (2) If the evidence supports a finding that the respondent committed the violations as alleged in the NOPV, the Division shall issue a written decision to the respondent specifying the section of the statute or regulation violated, the factual basis for the violation, the amount of the civil penalty, any corrective action deemed appropriate, and the response options available to the respondent.

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- (3) If the respondent is not satisfied with the informal review decision, the respondent may request an adjudicatory hearing under 220 CMR 99.11 by submitting a written request to the Department Secretary within 14 days of the date of the decision. Failure of the respondent to request an adjudicatory hearing within 14 days constitutes a waiver of respondent's right to contest the decision, and authorizes the Department, without further notice to the respondent, to hold the respondent liable to pay the civil penalty designated in the decision through the issuance of a remedial order under 220 CMR 99.12.

99.11: Adjudicatory Hearing

- (1) The adjudicatory hearing shall be a *de novo* hearing and shall be an adjudicatory proceeding as defined in M.G.L. c. 30A, and conducted pursuant to 220 CMR 1.00: *Procedural Rules*.
- (2) At the adjudicatory hearing, the respondent must be represented by an attorney, unless the respondent is an individual representing him or herself.
- (3) If the Department finds, after the adjudicatory hearing, that the respondent has violated M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196, it may issue a remedial order pursuant to 220 CMR 99.12.
- (4) If the Division determines, or the Department finds, after the request for an adjudicatory hearing has been filed, that the evidence indicates reason to believe that the respondent violated M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196 in a respect not stated in the NOPV or informal review decision, the Division shall issue a new NOPV with respect to the violation so determined or found.

99.12: Remedial Orders

- (1) If the Department finds that a violation has occurred or is continuing, it may issue a remedial order. The remedial order shall include a written opinion setting forth the factual and legal basis of the Department's findings and shall direct any party to take any action which is consistent with said party's obligations under M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196, including the payment of a civil penalty.
- (2) A remedial order issued by the Department under 220 CMR 99.12 shall be effective upon issuance, in accordance with its terms, unless stayed, suspended, modified or rescinded.

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- (3) A remedial order is a final decision of the Department within the meaning of M.G.L. c. 25, § 5, and thereby subject to review by the Supreme Judicial Court.
- (4) If the respondent fails either to appeal a remedial order to the Supreme Judicial Court pursuant to M.G.L. 25, § 5, or to comply fully with the order within 20 days, the Department may refer the case to the Attorney General with a request that an action be brought in the Superior Court to seek appropriate relief, including, but not limited to, collection of assessed penalties.

99.13: Consent Orders

- (1) Notwithstanding any other provision to the contrary, the Department or its designee may at any time resolve an outstanding enforcement proceeding with a consent order. A consent order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement with the terms therein. A consent order need not constitute an admission by any person that a violation has occurred.
- (2) A consent order is a final order of the Department, having the same force and effect as a remedial order issued pursuant to 220 CMR 99.12.
- (3) A consent order shall not be appealable by the respondent and shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Department.

99.14: Civil Penalties

- (1) Damage to Natural Gas Pipeline Facilities.
 - (a) Pursuant to M.G.L. c. 164, § 105A, any person, excavator or company found by the Department to have violated M.G.L. c. 82, §§ 40 through 40D, 220 CMR 99.00, 49 CFR 192.614, or 49 CFR Part 196 in relation to a natural gas pipeline facility when the Department has submitted and has in effect the annual certification to the United States Secretary of Transportation provided for in 49 U.S.C. § 60105 shall be subject to civil penalties as specified in 49 U.S.C. § 60122(a)(1).
 - (b) In determining the amount of the civil penalty, the Department shall consider the following criteria, set forth in 49 CFR 190.225:
 1. The nature, circumstances and gravity of the violation, including adverse impact on the environment;
 2. The degree of the respondent's culpability;
 3. The respondent's history of prior offenses;
 4. Any good faith by the respondent in attempting to achieve compliance; and

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5. The effect on the respondent's ability to continue in business.
- (c) The Department may also consider the following criteria set forth in 49 CFR 190.225:
1. The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and
 2. Such other matters as justice may require.
- (2) Damage to Facilities Other Than Natural Gas Pipelines.
- (a) Any person, excavator or company found by the Department to have violated M.G.L. c. 82, §§ 40 through 40D or 220 CMR 99.00 in relation to a facility other than a natural gas pipeline facility shall be subject to a civil penalty as specified in M.G.L. c. 82, § 40E.
 - (b) In determining the amount of the civil penalty, the Department shall consider to the criteria set forth in M.G.L. c. 164, § 105A, including the following: the appropriateness of the penalty to the size of the business of the person, firm, or corporation charged, the gravity of the violation, and the good faith of the person, firm, or corporation charged in attempting to achieve compliance after notification of a violation.
- (3) The Department may, at its discretion, refer damage prevention matters to the Office of Public Safety and Inspections.

REGULATORY AUTHORITY

220 CMR 99.00: 49 U.S.C. §§ 60105, 60114; 49 CFR Parts 192, 196, 198;
M.G.L. c. 82, §§ 40 through 40E; M.G.L. c. 164, §§ 66, 76, 76C, 76D, 105A.