The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 19-43-A October 4, 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 FINAL REGULATIONS

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I. PROCEDURAL BACKGROUND

On July 18, 2019, pursuant to G.L. c. 30A, § 2 and 220 CMR 2.00, the Department of Public Utilities ("Department") adopted emergency regulations ("Emergency Regulations") to implement 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")." By this Order, the Department adopts final regulations ("Final Regulations") contained in 220 CMR 99.00, which is now titled "Procedures for the Determination and Enforcement of Violations of Safety Codes Pertaining to Damage Prevention."[1]

Pursuant to the requirements of G.L. c. 30A, § 2, notice of this rulemaking was published in The Boston Globe on August 2, 2019, and in the Massachusetts Register on August 9, 2019. Written comments on the Emergency Regulations were due to the Department on August 26, 2019.[2] The Department held a public hearing on August 26,

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[1] Attached hereto as Appendix A is a copy of the Final Regulations marked to show the changes made to the Emergency Regulations. Attached hereto as Appendix B is a clean copy of the Final Regulations.

[2] The following entities submitted written initial comments: American Council of Engineering Companies of Massachusetts ("ACEC/MA"); Austin Powder Company ("APC"); Construction Industries of Massachusetts, Inc. ("CIM"); Comcast Cable Communications Management, LLC ("Comcast"); Dig Safe System, Inc. ("Dig Safe Center"); Feeney Utility Services Group ("Feeney"); Jeff Jacoby ("Jacoby"); Massachusetts Department of Transportation ("MassDOT"); Massachusetts Water Works Association ("MWWA"); New England Utility Constructors, Inc. ("NEUCO"); Northeast Gas Association ("NGA"); Maritimes & Northeast Pipeline, Algonquin Gas Transmission, and Kinder Morgan/Tennessee Gas Pipeline (jointly, "Transmission Companies"); Utility Contractors' Association of New England, Inc. ("UCANE"); and Verizon New England Inc. ("Verizon"). The following natural gas local distribution companies and electric distribution companies submitted joint comments ("LDC Comments"): NSTAR Electric Company and NSTAR Gas Company

2019.[3] Reply Comments were due on September 3, 2019.[4] Additionally, the Secretary of State of the Commonwealth of Massachusetts ("Secretary of State") provided the Department with minor, nonsubstantive edits.[5]

II. INTRODUCTION

Many commenters raised concerns with the emergency nature of this rulemaking and the implementation of new provisions -- other than the 911 call requirement to comply with federal law -- for which they did not have a chance to provide comment or input (see, e.g., UCANE Comments at 1; LDC Reply Comments at 2-3; Tr. at 10-11).

In particular, many of the concerns focused on the following provisions as imposing significant burdens without providing significant public safety enhancements: premarking and

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each d/b/a Eversource Energy; Massachusetts Electric Company, Nantucket Electric Company, Boston Gas Company, and Colonial Gas Company, each d/b/a National Grid; Fitchburg Gas and Electric Light Company d/b/a Unitil; Bay State Gas Company d/b/a Columbia Gas of Massachusetts; Liberty Utilities (New England Natural Gas Company) Corp. d/b/a Liberty Utilities; The Berkshire Gas Company; and Blackstone Gas Company.

[3] Two people spoke at the public hearing: John Kennedy of Kinder Morgan; and Robert Finelli, president of Dig Safe System, Inc.

[4] The LDCS, Comcast, and Verizon submitted written reply comments. The Attorney General of the Commonwealth of Massachusetts submitted a letter requesting that the Department notify her of any further action in this rulemaking.

[5] The Secretary of State's edits were as follows: (1) removing or adding hyphens as necessary; (2) changing upper-case letters to lower-case where appropriate; (3) reordering the definitions of "Premarking" and "Quarry" in 220 CMR 99.02 in alphabetical order; and (4) removing the comma before "including" in 220 CMR 99.12(4). In addition, the Department corrected the table of contents so that the title of 220 CMR 99.10 matched the actual title of that section, "Informal Review and Decision."

marking excavations over 500 feet (220 CMR 99.03(4), 99.06(7));[6] marking out abandoned facilities (220 CMR 99.06(6));[7] and having to notify excavators of privately owned facilities (220 CMR 99.06(13)) (see, e.g., Tr. at 6-7; MassDOT Comments at 1; Dig Safe Comments at 1, 2; LDC Comments at 4-11; NGA Comments at 2-4, 6-8; UCANE Comments at 2; NEUCO Comments at 2-5; Comcast Comments at 3-5; Verizon Comments at 1-4; MWWA Comments at 2; Transmission Companies Comments at 3; ACEC/MA Comments at 1-2).

Several commenters recommended that the Department conduct a technical session or stakeholders meeting to discuss these changes before implementing final regulations (see, e.g., LDC Comments at 4, 14; MassDOT Comments at 1; MWWA Comments at 1; ACEC/MA Comments at 1, 2; NGA Comments at 2; Comcast Reply Comments at 2).[8] The LDCs and Verizon recommended a dual-track approach, pursuant to which the Department would implement only the 911 call provision and postpone the other changes pending a technical session or drafting committee (LDC Reply Comments at 2-4; Verizon Reply Comments at 1).

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6 Unless otherwise noted, the citations refer to the Emergency Regulations that took effect on July 18, 2019, and on which the comments were made.

7 Only CIM endorsed the marking of abandoned lines (CIM Comments at 2).

8 We also note that ACEC/MA expressed its support for House Bill H2815, which would update the Dig Safe law, G.L. c. 82, §§ 40 through 40E, by extending its application to professional land surveyors during the planning or design phase of a project (ACEC/MA Comments at 2-3). We decline to comment on this pending bill as it is beyond the scope of this proceeding.

In response to these concerns, and upon further consideration, we have decided to remove the three provisions noted above and implement the final regulations with the changes noted below. The Department's overarching concern with amending the regulations is promoting public safety by improving communications among the parties involved in an excavation. Thus, where these particular sections (220 CMR 99.03(4), 99.06(7), 99.06(6), and 99.06(13)) are generating some amount of confusion, further deliberation is warranted, which this proceeding does not permit. We plan to meet with the stakeholders as soon as practicable to begin exploring how best to implement these provisions and explore other damage prevention issues in the future.

III. FINAL CHANGES TO EMERGENCY REGULATIONS

A. Definitions, 220 CMR 99.02

1. Comments

We received various comments regarding the current definitions. UCANE recommended changing the definition of "Damage or Excavation Damage" to delete certain words that UCANE deemed unclear, ambiguous, or likely to invite subjective interpretation:

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

(UCANE Comments at 2 & Att. A).

Comcast recommended adding "saw cutting" to the definition of "Excavation" to remove any ambiguity for excavators using this method (Comcast Comments at 7-8).

Feeney proposed the following changes to the definition of "Marking":

> The practice of identifying the location of the center line of the underground facility by the use of visible standard color-coded ~~fluid~~ markings with material, such as paint, stakes or flags on the ground above the facility.

(Feeney Comments at 1).

At the public hearing, Mr. Kennedy of Kinder Morgan recommended that municipalities should be included as "Excavators" for the purposes of excavation safety (Tr. at 6).

NEUCO recommended adding the color pink to the definition of "Premarking" as an acceptable alternative to white where appropriate (NEUCO Comments at 2). UCANE proposed a technical clarification to the definition of "Premarking" to distinguish premarking paved surfaces from premarking nonpaved surfaces (UCANE Comments at 2 & Att. A).

Finally, NEUCO recommended clarifying the definition of "Underground Facility" to exclude municipal water and sewer facilities, stating that they are not required to participate in the Dig Safe system and are not subject to these regulations (NEUCO Comments at 2). As an alternative to changing the definition of "Underground Facility," NEUCO recommended modifying 220 CMR 99.07 to clarify that damage to noncovered facilities, such as municipal water or sewerage facilities, do not require notification to the Dig Safe Center or a report to the Department (NEUCO Comments at 7).

2. Analysis and Findings

While we appreciate UCANE's efforts to improve the definition of "Damage or Excavation Damage," we find that there is no need to amend the definition as currently

written. Moreover, some of the proposed changes would not improve public safety or could limit the scope of what the Department considers damage.

Rather than specifying "saw cutting" as a method of excavation, we prefer to reference the statutory definition of "Excavation" in the Dig Safe law, G.L. c. 82, § 40. We further note, as did Comcast, that saw cutting is encompassed by the "including, but not limited to" language in the statutory definition.

Regarding the inclusion of municipalities in the definition of "Excavators," we find that the current definition does not exclude municipalities, and thus there is no need for a change:

> 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.

We do not accept the recommended changes to the "Marking" definition as they would not enhance public safety or help to clarify terms, and in some cases could create confusion. Nevertheless, for clarity and consistency with the terms used in other provisions, we have changed "fluid" to "visible marking material."

We have amended "Premarking" by adding flags as an option (since these are used on occasion), and have otherwise reorganized the sentence for clarity, as UCANE recommended. We also clarify in the regulations that pink may be used for premarking in certain circumstances when white is not appropriate, pursuant to 220 CMR 99.03(2).

We do not agree with NEUCO's recommendation regarding municipal water and sewerage facilities being excluded from the definition of "Underground facility." The

current language encompasses "any property" buried in the ground and used to transport water or sewerage, public or private. Even if municipal water departments are exempt from the definition of "Company," excavators who damage their lines should nevertheless follow the Dig Safe regulations regarding avoiding damage to them and reporting such damage when it occurs. We further note that many such entities are members of Dig Safe. See http://www.digsafe.com/member_companies.php.

B. Premarking, 220 CMR 99.03

1. Comments

Aside from the numerous comments received objecting to the provision regarding excavations over 500 feet (which provision has been removed, as noted above), we received comments from the Transmission Companies on two other items in this section. First, the Transmission Companies objected to the 220 CMR 99.03(2) requirement to notify the Dig Safe Center when pink is used for premarking, stating that this information serves no useful purpose and that dissemination of it would be impractical (Transmission Companies at 1). Second, the Transmission Companies raised a concern regarding the prudency and practicality of using a guardrail, guiderail, or fence as premarks when excavating to replace the guardrail, guiderail, or fence (Transmission Companies Comments at 1).

2. Analysis and Findings

Regarding the need to provide notice to the Dig Safe Center upon using pink for premarking, we find that this requirement is useful and necessary because pink may also be used for temporary survey marks or to distinguish from other color-coded marks, pursuant to

the "Standard Color Code" definition in 220 CMR 99.02. Notifying the Dig Safe Center when pink is used for premarking will enable the Dig Safe Center to add this information to the ticket and thus minimize any confusion or miscommunication among the parties. Moreover, the Department established this procedure in its 1999 Dig Safe rulemaking, D.T.E. 98-109, at 4, and the commenters have not provided us with a sufficient basis to change it now.

The Department also established the provision regarding the use of guardrails or fences as premarks in its 1999 rulemaking, D.T.E. 98-109. At that time, the Department was of the opinion that guardrails or fences may serve as premarks when their replacement is collinear with the original. D.T.E. 98-109, at 4. Moreover, in 220 CMR 99.03(3), we added a requirement for the excavator to provide a description of the excavation location in the notice to the Dig Safe Center. Thus, where the Department has previously considered this issue and has not been presented with any evidence that this method is impractical or imprudent, we find no need for further revision.

C. Excavation Notification, 220 CMR 99.04

1. Comments

We received a number of comments regarding notification of an excavation by blasting for an unanticipated obstruction, 220 CMR 99.04(2). The companies objected to the four-hour notice for unanticipated blasting and recommended that 72 hours or two business days would be more appropriate, thus giving them a chance to obtain specifications on the blast site and any potential effect on their facilities (NGA Comments at 5; Transmission

Companies Comments at 1-2; Tr. at 7-8). The excavators objected to the four-hour notice as being too long and suggested a three-hour window to avoid delays (CIM Comments at 2; UCANE Comments at 2). CIM and UCANE also objected to having to provide the specific date and location for blasting in the initial notice, stating that there are too many uncertainties at that time, that the anticipated blasting needs might change, and that the specifics cannot be known until closer to when the blasting begins (CIM Comments at 2; UCANE Comments at 2).

2. Analysis and Findings

We do not agree with the commenters regarding notification of an excavation by blasting. The language of this provision is consistent with the language contained in the Dig Safe law, which is as follows:

> 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 case of an unanticipated obstruction requiring blasting when such notice shall be *not less than four hours* prior to such blasting.

G.L. c. 82, § 40A (emphasis added). Thus, where the Legislature intended for excavators to include the date and location of the blasting in the notice and to provide notice of blasting to remove an unanticipated obstruction within four hours, there is not a legal basis for making the requested changes.

D. Emergency Notice, 220 CMR 99.05

1. Comments

Dig Safe objected to 220 CMR 99.05(3) in its entirety as it imposes on the Dig Safe Center the responsibility for knowing when to issue an emergency Dig Safe ticket and could lead to serious problems if Dig Safe were to refuse such a request (Dig Safe Comments at 1). Dig Safe argued that its staff makes decisions regarding emergency tickets based solely on the information provided by an excavator, and the burden to monitor the ticket should fall on the responding companies, not on Dig Safe (Dig Safe Comments at 1).

Several commenters objected to the five-hour deadline for responding to an emergency (220 CMR 99.05(4)) as being too long and not promoting public safety (Dig Safe Comments at 2; NEUCO Comments at 4; Transmission Companies Comments at 2; Comcast Comments at 2-3; UCANE Comments at 3 & Att. A). They recommended that the Department remove this language or consider reducing the deadline to three hours or less.

Commenters also objected to 220 CMR 99.05(6), which requires excavators to provide notice to the Dig Safe Center at the conclusion of an emergency. Dig Safe, NEUCO, Verizon, Comcast, NGA, and UCANE all suggested that this requirement serves little purpose, imposes unnecessary burdens, and does not promote public safety or mitigate damage (see, e.g., Dig Safe Comments at 2; UCANE Comments at 3; NEUCO Comments at 4; Verizon Reply Comments at 3; Comcast Reply Comments at 2). The Transmission Companies agreed that there is no need to call Dig Safe when the emergency is over unless there is further excavation required beyond the premarked area (Transmission Companies

Comments at 2). In addition, NGA stated that there is no indication of how the Dig Safe Center will collect or communicate the information, what it will do with this information, or what the benefit is considering the additional administrative costs (NGA Comments at 5).

2. Analysis and Findings

Dig Safe objected to being made responsible for knowing when an excavator is not entitled to an emergency ticket, but we find that the Dig Safe Center is the most appropriate party to make this initial determination. We are aware of occasions on which Dig Safe has issued an emergency ticket even after informing the requester that the situation was not an emergency, as in the case of tent companies seeking to put up a tent in less than 72 hours. It is the Department's duty pursuant to G.L. c. 164, § 76D to ensure that the Dig Safe Center operates appropriately and responsibly. Inclusion of the "unless it believes in good faith that the circumstances constitute an emergency" language prevents this provision from imposing strict liability on Dig Safe if staff has no reason to disbelieve an excavator that requests an emergency ticket. But if staff has reason to question the request, as noted above, it has a responsibility to prevent abuse of the system. Moreover, we find that the definition of "Emergency" in 220 CMR 99.02 provides sufficient direction to Dig Safe to determine what constitutes an actual emergency. Thus, we reject the recommendation to remove this provision.

Regarding the time required for companies to respond to an emergency notification, we find it necessary and appropriate to implement a deadline by which companies must respond to an emergency, so that a company does not unreasonably delay in responding.

Nevertheless, in consideration of the comments received, we have reduced the deadline from five hours to three. Final Regulations, 220 CMR 99.05(4). Moreover, we have eliminated the need to call Dig Safe when the emergency is over, unless excavation is continuing beyond the area premarked for the emergency. Final Regulations, 220 CMR 99.05(6). In that case, the excavator must call Dig Safe to request a new ticket and allow the companies 72 hours to mark their facilities before continuing the excavation.

E. Marking Procedures, 220 CMR 99.06

1. Comments

With regard to the marking requirements, commenters proposed several changes. NGA suggested that an excavator that also owns the underground facility should be permitted to exceed the 72-hour marking requirement (220 CMR 99.06(1)), as long as the excavator/company marks the facility prior to starting the excavation (NGA Comments at 5-6). NGA also objected to the use of the center-line method (220 CMR 99.06(2)) for companies with multiple electric or communication facilities in the same trench, and suggested that the Department allow the corridor method as recommended by Common Ground Alliance's Best Practices (NGA Comments at 6). UCANE proposed adding language to 220 CMR 99.06(9) to specify that newly installed walks or curbs may be marked with chalk or other transient methods, as is allowed for historical locations (UCANE Comments at 3 & Att. A).

Many commenters objected to 220 CMR 99.06(11) regarding a company's responsibility to notify excavators after marking newly installed facilities. The commenters

stated that it is unclear how the company will know which excavators should be notified, and that it should be enough to mark the newly installed facility (Dig Safe Comments at 2; NEUCO Comments at 5-6; Transmission Companies Comments at 2-3; LDC Comments at 12-13; NGA Comments at 9; Verizon Reply Comments at 2). NEUCO further suggested that new mains be marked once they are activated or per the operator's requirements, rather than when backfilled, and that services be marked upon installation (NEUCO Comments at 6).

UCANE recommended a provision requiring companies to conduct periodic audits of their marking practices to ensure safety and compliance (UCANE Comments at 11 & Att. A).

The Transmission Companies recommended that municipalities, departments of transportation, public works, sewer districts, water districts, and similar entities should not be exempt from membership in Dig Safe (Transmission Companies Comments at 4). Finally, we received a recommendation from the Transmission Companies to add a positive response system to increase safety, as it has proven useful in other states (Tr. at 8-9; Transmission Companies Comments at 4).

2. Analysis and Findings

Regarding NGA's suggestion to allow companies to exceed the 72-hour deadline for marking, the Department does not agree. We find that this practice would not promote public safety because there could be miscommunication between the excavating and marking

divisions of the same company. Moreover, we find no support in the Dig Safe law for allowing exceptions to the 72-hour requirement.

Regarding use of the corridor method for marking multiple electric or communication lines, we decline to allow this method as an alternative to the center-line method. In the 1999 Dig Safe rulemaking, D.T.E. 98-109, at 6-7, the Department rejected a recommendation to eliminate the center-line method and allow only the corridor method, stating that the center-line method was the industry standard and using only the corridor method was a variance that would increase the risk of damage and serious injury. The Department then eliminated the corridor method and specifically found that the center-line method was the only acceptable method for marking underground facilities. D.T.E. 98-109, at 7. As this method has been in place since 1999 and is working well, we see no need to change it. If necessary and appropriate, a company can indicate the presence of multiple lines with the center-line method by including the total width of the trench or otherwise indicating the total number of lines being marked.

As for specifically permitting the use of chalk or other transient methods for newly installed curbs and walkways, we do not find it necessary to add this to the regulation as we are aware of no problems or confusion with the current practice, and the recommendation does not promote greater public safety. Moreover, the definition of "Marking" in 220 CMR 99.02 already offers alternatives for visible marking materials.

As for newly installed lines, we acknowledge the objections to and difficulties of notifying excavators in the area, and thus we have decided to remove that particular

requirement. In its place, we have added a requirement for companies to document their marking of newly installed lines. Final Regulations, 220 CMR 99.06(9). We continue to require companies to mark their lines upon installation to prevent damage.

Regarding the recommendation to require companies to conduct periodic audits of their marking practices, we do not find it necessary to add this provision. Nevertheless, we recommend that companies conduct such audits as necessary to ensure compliance with 49 C.F.R. § 192.614.

In response to the recommendation that municipalities, departments of transportation, public works, sewer districts, water districts, and similar entities should not be exempt from membership in Dig Safe, we note again that many such entities are members of Dig Safe. See http://www.digsafe.com/member_companies.php. We further note that we cannot require membership of entities such as municipal water departments where the Dig Safe law has expressly exempted them. G.L. c. 82, § 40; see also G.L. c. 164, § 76D (providing that public utility companies and municipal utility departments that provide gas, electricity, cable, or telephone service shall participate in the Dig Safe damage prevention system); Dig Safe Rulemaking, D.P.U. 88-40, at 11-12 (1991) (discussing the issue).

Finally, we have added a new provision requiring companies that receive notification of an excavation from the Dig Safe Center to affirmatively inform the excavator or otherwise indicate if they have no underground facilities within the safety zone. Final Regulations, 220 CMR 99.06(10). This new provision will promote public safety by eliminating any uncertainty for the excavator when a company does not respond to a notification. We further

note that electronic positive response systems are used in many other states (e.g., California, Florida, Ohio), and we may explore this matter further with the stakeholders to see if Massachusetts could establish a similar process.

F. Excavation, 220 CMR 99.07

1. Comments

Several commenters proposed changes to 220 CMR 99.07(1) regarding excavation procedures. Dig Safe and others suggested that each Dig Safe ticket should have an expiration date of 30-60 days, as it will increase safety and accountability (Tr. at 8, 12; Transmission Companies Comments at 4; Comcast Comments at 7; NGA Comments at 9; see also Verizon Reply Comments at 2). NGA also recommended adding language to specify when an excavation may commence to eliminate any confusion (NGA Comments at 9).

Commenters requested several clarifications to the language in 220 CMR 99.07(1), which outlines procedures for excavation within the safety zone. NEUCO recommended that the language be softened to allow for reasonable excavation practices to remove hard surfaces, noting that it may be impossible to avoid damage to a facility installed is directly below the surface (NEUCO Comments at 6). NEUCO further asked the Department to consider adding "(i.e., hand digging or vacuum excavation)" as examples of nonmechanical means (NEUCO Comments at 6). UCANE also suggested adding examples of acceptable nonmechanical means (UCANE Comments at 3 & Att. A). CIM expressed concern as to the impact that the revised provision would have on micro-milling and general milling of roadways, arguing that they should not be considered excavation because they consist of

surface work no deeper than six inches, whereas reclaiming work is usually deeper (CIM Comments at 2).[9] Feeney proposed adding "rock" as a material used for travel surfaces (Feeney Comments at 2).

There were several objections to the language regarding the 24-hour waiting period following a request for remarking in 220 CMR 99.07(3). Dig Safe argued that this mandate will lead to excavators not calling for a remark, so that they can remain productive (Dig Safe Comments at 2). UCANE and others suggested narrowing the language so that the 24-hour suspension applies only to the area that needs remarking, not the entire worksite or scope of the Dig Safe ticket (see, e.g., UCANE Comments at 3; CIM Comments at 2). NEUCO and the Transmission Companies further proposed clarifying that the excavation should be suspended for 24 hours or until the area is remarked (NEUCO Comments at 6; Transmission Companies Comments at 3).

There were other areas where commenters asked for change or clarification. NEUCO suggested adding language to 220 CMR 99.07(4) to clarify that the excavator should also call Dig Safe if the excavator and the company make any changes or "need to modify the premarked area" (NEUCO Comments at 7). Feeney proposed changing the language in 220 CMR 99.07(5) as follows, to require an excavator who observes a company's mismark to report it to the Department as a violation:

> If an excavator observes ~~clear evidence of the presence of~~ ~~an~~ company's unmarked or mismarked underground facility in the area of the proposed

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[9] Milling removes just the top course of existing asphalt, whereas reclaiming pulverizes the asphalt and underlying materials to produce a new base on which to pave.

> excavation or during the excavation, the excavator shall not begin or continue excavating until notifying the Dig Safe Center. Thereafter the excavator ~~and~~ shall protect the underground facility while excavating by employing reasonable precautions to avoid damage to the underground facility. An excavator shall report suspected violation(s) of Dig Safe to the Department within thirty (30) days of the observation. All such reports shall be in a form deemed necessary and appropriate by the Department.

(Feeney Comments at 2). UCANE suggested adding "suspend" to "not begin" in the same provision for those cases where an excavator has already begun the excavation (UCANE Comments at 3 & Att. A). UCANE also proposed language in 220 CMR 99.07(6) to clarify that an excavator, with a company's authorization and direction, should remove only that portion of the abandoned underground facility located in proximity to the safety zone and impeding excavation progress (UCANE Comments at 3 & Att. A).

There were several questions on 220 CMR 99.07(7) regarding what to do when an excavator damages an underground facility. Feeney proposed applying this provision when an excavator becomes aware of damage (as opposed to causing it) and requested clarification that the 911 call should be made if the resulting escape of gas is "uncontrolled (Feeney Comments at 3). The Transmission Companies proposed requiring a call to 911 immediately if "the damage results in a public safety issue" (Transmission Companies Comments at 3). Feeney also opposed the mandate requiring untrained excavators to evacuate nearby structures (Feeney Comments at 3). Feeney and the Transmission Companies further suggested removing the mandate to notify the Dig Safe Center (Feeney Comments at 3; Transmission Company Comments at 4). Feeney and others suggested clarifying that the report to the Department must be made within 30 days and suggested language regarding the

method of reporting (Feeney Comments at 3; UCANE Comments at 3 & Att. A; NGA Comments at 9). The LDCs opposed Feeney's recommendations, arguing that the changes could allow for too much discretion by parties not focused on safety, whereas the provision as implemented would lead to enhanced public safety (LDC Reply Comments at 4).

NEUCO questioned the meaning of "makes contact with an underground facility" as used in 220 CMR 99.07(8) (NEUCO Comments at 7). Finally, UCANE noted that 220 CMR 99.09 should mandate that both excavators and companies report damage or violations to the Department within 30 days (UCANE Comments at 3 & Att. A).

2. Analysis and Findings

In response to NGA's comments, we have added a provision stating that an excavation may begin after 72 hours from notification. Final Regulations, 220 CMR 99.07(1). This applies even if an excavator is told that a company has no underground facilities in the premarked area, to avoid any miscommunication between the excavator and the company. We find no support in the Dig Safe Law for allowing any exceptions to the 72-hour window, other than for emergencies.

In response to the recommendations of several commenters for a ticket expiration, we have added a provision specifying that "A Dig Safe ticket shall be valid for 30 calendar days from the date of notification, as long as the markings remain clear and discernible." Final Regulations, 220 CMR 99.07(2). This change will enhance public safety and communication among the parties while ameliorating other concerns, such as those involving the maintenance of marks or the need to call for remarking. Almost all of the other New England states have

implemented a 30-day expiration, with Maine allowing a 60-day expiration (and only Rhode Island not requiring any expiration).[10] Many other states have 30-day or shorter expirations,[11] and at least two others have 45-day expirations.[12] Having an expiration date also obviates the need to state that the marks remain valid unless the excavation does not begin within 30 days of notification, and thus we have removed what was Emergency Regulations, 220 CMR 99.06(12). The Department recommends that when calling in for a 30-day ticket, the excavator consider the amount and scope of work that can reasonably be accomplished in 30 days and tailor the notification accordingly. We further recommend that excavators call in for a new ticket far enough in advance of the expiration date so as not to have to suspend the excavation for 72 hours.

We received comments regarding the conduct of an excavation, how to define nonmechanical means, and what constitutes a traveling surface. In response to those comments, we have decided to replace the language in Emergency Regulations, 220 CMR 99.07(1), with the language that was in effect prior to this rulemaking:

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10 See Connecticut: Conn. Agencies Regs. § 16-345-4(d); Maine: Me. Rev. Stat. Ann. tit. 23, § 3360-A.3.E and 65-407-895 Code Me. R. § 4.B.1.d; New Hampshire: N.H. Rev. Stat. Ann. § 374:51, VI; Vermont: Vt. Stat. Ann. tit. 30, § 7004(e)(1).

11 See California: Cal. Pub. Util. Code § 4216.2(e); Colorado: Colo. Rev. Stat. § 9-1.5-103(4)(b); Florida: Fla. Stat. § 556.105(1)(c); Georgia: Ga. Code Ann. § 25-9-6(c); Illinois: 220 Ill. Comp. Stat. 50/4(g); Nevada: Nev. Admin. Code § 455.165.1.

12 See New Jersey: N.J. Stat. Ann. § 48:2-82(f) and N.J. Admin. Code § 14:2-3.1(c); Oregon: Or. Admin. R. 952-001-0010(23); Washington: Wash. Rev. Code 19.122.030(6)(c).

> When excavating in close proximity to the underground facilities of any company, nonmechanical means shall be employed, as necessary, to avoid damage in locating such facility, and any further excavation shall be performed employing reasonable precautions to avoid damage to any underground facilities including, but not limited to, any substantial weakening of structural or lateral support of such 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, mechanical means may only be used for the initial penetration of pavement, rock or other such materials, so long as non-mechanical means are employed after the paving, rock or other such material has been penetrated.

Final Regulations, 220 CMR 99.07(3). We plan to revisit the issues raised with the stakeholders at a later time.

In response to objections to regarding the suspension of an excavation for 24 hours after a request for remarking, we have added language that requires the excavator to suspend the excavation for 24 hours only in the area that requires remarking. Final Regulations, 220 CMR 99.07(5).

Regarding Emergency Regulations, 220 CMR 99.07(4) and the need to call Dig Safe if the parties agree to any changes, we have decided to delete this provision at this time for further consideration and discussion. Nevertheless, we note that an excavator should always call Dig Safe for a new ticket if there is a need to modify the premarked area, to ensure that the excavation is adequately marked.

Regarding Feeney's recommendations rewriting Emergency Regulations, 220 CMR 99.07(5), we do not see the need for these changes since there are subsequent provisions that apply to the discovery of a mismarked facility and the requirement to notify the Department of violations. Nevertheless, we have substituted "suspend" in place of "not begin" to

address those situations where an excavation may have already begun. Final Regulations, 220 CMR 99.07(7).

Regarding Emergency Regulations, 220 CMR 99.07(6), we have determined that the company is in the best position to decide how an excavator should remove abandoned underground facilities. Thus we have struck language from the provision and leave the details to the company's discretion. Final Regulations, 220 CMR 99.07(8).

Regarding Feeney's recommended changes to Emergency Regulations, 220 CMR 99.07(7), we decline to add "becomes aware of" damage because this particular provision is intended to apply only when an excavator causes damage, whereas the situation involving discovery of damage is covered in a subsequent provision. We have not adopted language to require that an excavator must call 911 for damage resulting in a "public safety issue," but we recommend that excavators use their discretion and call 911 in situations other than the escape of gas if warranted. There is also no need to specify "uncontrolled" escape of gas because damage resulting in the escape of gas is presumably uncontrolled.

We note that while emergency responders may be better trained in conducting evacuations, excavators may be in the best position to commence evacuations to ensure public safety before emergency responders arrive. We agree with the comments that there is no need to alert the Dig Safe Center of damage, as the Dig Safe Center's primary responsibility is to coordinate excavation notification and marking. Thus, we have struck that provision, but we note that an excavator should call the Dig Safe Center if it does not know who owns the damaged facility. Final Regulations, 220 CMR 99.07(9). Regarding the comments on

how to report damage to the Department, we now specify that an excavator has 30 days to do so "using a form deemed necessary and appropriate by the Department." Final Regulations, 220 CMR 99.07(9). Of course, a report should be made sooner than 30 days if the situation demands immediate Department notice. Further, we now specify that excavators, in addition to companies, must report any damage or violation of which they have knowledge or reason to know to the Department within 30 days. Final Regulations, 220 CMR 99.07(11). We have amended the Dig Safe Violation Report form provided on our website, https://www.mass.gov/how-to/report-a-dig-safe-violation-or-damage, to permit reporting either violations or damage; instructions regarding the use of this form are also available on the website.

Finally, in response to NEUCO's comments regarding Emergency Regulations, 220 CMR 99.07(8), we changed "makes contact with any underground facility" to "causes damage to any underground facility or becomes aware of such damage." Final Regulations, 220 CMR 99.07(10). We note that this provision is distinguishable from those discussed above because it requires *anyone* with knowledge of damage to underground facilities, not just excavators, to inform the company.

G. Blasting at Quarries, 220 CMR 99.08

1. Comments

Several commenters expressed concern with the provisions regarding blasting at quarries. APC and UCANE argued that 220 CMR 99.08(1), requiring Department approval when the property line of the quarry is within 500 feet of the underground facility, is overly

restrictive (APC Comments at 1; UCANE Comments at 3-4). They argued that the measurement should be made from the blasting site to the underground facility, as that has been the current policy and practice (APC Comments at 1; UCANE Comments at 3-4). Mr. Jacoby noted that it is an economic hardship and a waste of time to have to call everyone within 500 feet of the property (Jacoby Comments at 1). APC noted that some quarries are on large tracts of land and that the blasting site may be far inside the property, well away from the underground facilities (APC Comments at 1). APC also questioned the need for Department oversight in this matter where blasting operations are already overseen by the Department of Fire Services (APC Comments at 1). Further, APC contended that the 24-hour notice prior to the blast is too long because sometimes a blasting decision is made in the afternoon for the following morning (APC Comments at 1).

The LDCs disagreed with APC's comment seeking to reduce oversight of blasting at quarries (LDC Reply Comments at 3). NGA also endorsed the Department's oversight but recommended that the Department should contact the companies when a request is received to verify that the records on file are current and accurate (NGA Comments at 10).

2. Analysis and Findings

In 2014, the Legislature enacted An Act Relative to Natural Gas Leaks, St. 2014, c. 149 ("Act"). Section 7 of this Act provides as follows:

> Notwithstanding any general or special law to the contrary, explosive material, as defined in 527 CMR 13.03, shall not be used to fire a blast in any blasting operation at a site primarily used as a source of mined products from the earth if such site is within 500 feet of a natural gas pipeline or metering and regulation station without written approval by the department of public utilities.

Pursuant to this language, Department approval is required if the blasting operation takes place "at a site primarily used as a source of mined products from the earth" (i.e., a quarry) if such site (i.e., the quarry itself, not the location of the blasting operation within the quarry), is 500 feet from a natural gas pipeline or metering and regulation station. While this may not have been the practice previously, this has been the law since 2014. Moreover, the Legislature has clearly authorized the Department to provide approval for blasting at quarries in addition to oversight by other public officials. Thus, where the Dig Safe regulation is consistent with Section 7 of the Act, we will not make any changes to it. Final Regulations, 220 CMR 99.08.

Moreover, the 24-hour notice has been the required procedure -- and has been noted in the Application for Blasting at Quarries instructions -- since early 2017. The provisions of 220 CMR 99.08 simply incorporated the previously established procedures (which can be found at https://www.mass.gov/how-to/apply-for-permission-to-blast-at-a-quarry) into the Dig Safe regulations. We have not been made aware of any concerns with this procedure and thus see no need to change it. Nevertheless, if there is a change of circumstances within that 24-hour window, the blaster should notify the Department.

Regarding NGA's concern with inaccurate records, the Department generally reviews all applications that it receives for blasting at a quarry, and expects that an applicant would not submit an application if the 500-foot threshold were not met. Thus, an inquiry into the accuracy of the records might become an issue only if there were an alleged violation.

Accordingly, the Department will use its discretion and contact the company where necessary, depending on the circumstances.

H. Enforcement Procedures, 220 CMR 99.14

1. Comments

Several commenters proposed changes to 220 CMR 99.09 and 99.10, regarding issuing a notice of probable violation ("NOPV") and subsequent informal review. Feeney suggested requiring the Department to issue an NOPV within 30 days of receipt of a violation report, so as not to delay enforcement proceedings, and requiring the Division to issue an informal decision within 30 days after the informal conference or receipt of a written reply to the NOPV (Feeney Comments at 4-5). Feeney also suggested requiring a respondent to take action within 30 days of *receipt* of an NOPV, as opposed to 30 days of the *date* of an NOPV (Feeney Comments at 4). Feeney also recommended that the Division issue a new NOPV within 14 days of the informal conference or receipt of a written reply to the NOPV when the evidence "supports a determination that a violation" has occurred or is occurring, rather than when the evidence "indicates reason to believe that the respondent has violated" the law (Feeney Comments at 4).

UCANE suggested adding language to 220 CMR 99.09(1) to distinguish NOPVs regarding natural gas lines from NOPVs regarding other facilities (UCANE Comments at 4 & Att. A). UCANE also proposed language requiring the Department to issue NOPVs and subsequent decisions through certified mail (UCANE Comments at 4 & Att. A).

UCANE recommended that the deadline for requesting an adjudicatory hearing in 220 CMR 99.10(3) be changed to 14 days from when the decision is received, as opposed to 14 days from when the decision is rendered (UCANE Comments at 4 & Att. A). In addition, both Feeney and UCANE proposed eliminating 220 CMR 99.11(4) entirely, arguing that it is unfair to allow the Division to issue a new or revised NOPV after the request for an adjudicatory hearing has been filed (Feeney Comments at 5; UCANE Comments at 4 & Att. A).

Many commenters objected to the proposed revisions to 220 CMR 99.14 regarding imposition of the federal civil penalties for violations relating to natural gas facilities. UCANE objected to imposing civil penalties through reference to the federal regulations and argued that the new language would lead to onerous civil penalties and disadvantage companies or even put them out of business (UCANE Comments at 4). CIM argued that the old language was predictable, objective, and served as a deterrent (CIM Comments at 2). Both UCANE and CIM suggest that instead of a monetary penalty for first-time offenses, the regulations should allow for alternative penalties such as safety or training courses (UCANE Comments, Att. A; CIM Comments at 2). UCANE further recommended a provision that excavators should not be penalized if the damage results from a company's failure to comply with the law (UCANE Comments, Att. A). Enbridge suggested that any funds collected through penalties be earmarked for Dig Safe education and training (Enbridge Comments at 5). UCANE also suggested reinserting the words "as provided by statute" in 220 CMR 99.12(10) to provide clarity as to the penalty structure being referenced in remedial orders

(UCANE Comments at 4 & Att. A). Feeney proposed changes to the criteria used to determine civil penalties in 220 CMR 99.14(2)(b), arguing that the Department should not consider the size of a business nor any alleged violations not fully adjudicated (Feeney Comments at 5-6).

The LDCs disagreed with UCANE's and CIM's proposed changes to the calculation of civil penalties, arguing that these changes were not appropriate and would not further the goals of enhancing public safety (LDC Reply Comments at 3). The LDCs also noted that the parties have had ample time to educate themselves regarding the Dig Safe program, as it is not newly enacted, and that any alternative penalties, even for a first offense, would not serve as a deterrent and would act only as a "free hit" (LDC Reply Comments at 3).

2. Analysis and Findings

The Department declines to change the NOPV and informal review procedures. Feeney's suggestions that the Department must issue an initial NOPV, a new NOPV based on new evidence, or an informal review decision within a specified number of days would put unnecessary and inappropriate time constraints on the Department's ability to conduct its investigation. We also decline to adopt Feeney's and UCANE's proposals that the required number of days to respond to an NOPV or to request an adjudicatory hearing should count from the date of receipt of the NOPV or informal review decision. We find that the date of the document itself, rather than the date of receipt, provides a clear and precise trigger for the deadline, and offers sufficient time for the respondent to respond. We further note that a request for an adjudicatory hearing can be easily made and need not be submitted with any

legal research or evidence, and thus 14 days from the date of the informal review decision should be more than sufficient. As for Feeney's suggested language changes regarding when the Division may issue a new NOPV, we decline to adopt these as they do not improve the regulation.

The Department declines to adopt UCANE's request regarding sending NOPVs and other documents by certified mail. While the Department frequently sends these documents by certified mail, there may be instances when certified mail may not be appropriate or convenient, and we find no reason to constrain the Department by putting this requirement in the regulations.

Regarding UCANE's request to distinguish NOPVs regarding natural gas lines from other NOPVs, we find these changes unnecessary because the process of issuing an NOPV remains the same regardless of the statutory/regulatory basis of the allegations. As for UCANE's recommendation that an excavator cannot be fined for damage where the damage results from a company's violation of the Dig Safe law, this determination should be left to the Department's discretion, as there may be situations where an excavator should also be penalized for its violation regardless of the company's violation. Moreover, we decline UCANE's and Feeney's requests to strike the language regarding issuing a new NOPV after an adjudicatory proceeding has begun. A substantially similar version of this provision was in the prior regulation and remains appropriate here as it provides fair notice of and an opportunity to respond to any new allegations.

Finally, the Department has considered the arguments regarding 220 CMR 99.14, Civil Penalties. Many commenters objected to the new penalties and calculations, or sought language to reference the Dig Safe law penalties only. The Department believes that significant penalties are warranted when it comes to violations relating to natural gas pipelines. This does not mean that the Department will impose penalties at the upper levels of the federal penalty amounts in every case, particularly if the violation was committed by an individual or small excavating company. But it will give the Department the discretion to impose fines higher than $1,000 for first-time offenses or $10,000 for subsequent offenses where appropriate. This will serve as a deterrent to future Dig Safe violations and promote public safety. We also decline to adopt Enbridge's recommendation that penalties should be earmarked for Dig Safe training, as this request is beyond the scope of this rulemaking.

We decline to adopt a provision regarding alternative penalties for first time violations, although the Department retains the discretion to offer training to first-time offenders in certain situations. Otherwise, we have reorganized this section to indicate that the Department may apply any of the applicable criteria when determining the amount of the civil penalty, regardless of whether the violation concerns a natural gas facility. We have also changed the language of the headings to clarify that a violation does not always involve damage. Final Regulations, 220 CMR 99.14.

IV. ADOPTION OF THE REGULATIONS

We find that the adoption as final of the Emergency Regulations, as revised herein, is in the public interest and is necessary for the public convenience. By this Order, we adopt

the Final Regulations, 220 CMR 99.00, "Procedures for the Determination and Enforcement of Violations of Safety Codes Pertaining to Damage Prevention." The Department has filed a standard Regulation Filing Form and revised regulations 220 CMR 99.00 with the Office of the Secretary of the Commonwealth, State Publications and Regulations Division. These Final Regulations supersede the Emergency Regulations and go into effect upon publication in the Massachusetts Register. See 950 CMR 20.05(2)(b).

V. ORDER

Accordingly, after notice, comments, hearing, and due consideration, it is

ORDERED: That the regulations, entitled "Procedures for the Determination and Enforcement of Violations of Safety Codes Pertaining to Damage Prevention," attached hereto and designated as 220 CMR 99.00, are hereby ADOPTED.

By Order of the Department,

/s/

Matthew H. Nelson, Chair

/s/

Robert E. Hayden, Commissioner

/s/

Cecile M. Fraser, Commissioner

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

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

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:

Blasting. Excavation by means of explosives.

Center-lLine 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, visible marking materialfluid, 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. 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 (or pink, pursuant to 220 CMR 99.03(2)) paint on the paved surface of the ground, or using flags, stakes, or other suitable white (or pink, pursuant to 220 CMR 99.03(2)) marking on nonpaved surfaces.

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

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),~~A ~~a~~n 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, 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)~~(3) ~~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.

(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~~three 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) Once ~~The excavator shall provide notice to the Dig Safe Center when~~ the emergency has been brought to conclusion~~. Thereafter~~, and if further excavation is to be done beyond the premarked 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.

(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 wherepremarking 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)~~(6) 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)~~(7) 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)~~(8) 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)~~(9) Upon installing any new underground facilities or part thereof, ~~a~~ the company shall mark out the location of the newly installed facilities as they are backfilled or installed, and ~~, and shall notify excavators with a valid Dig Safe ticket working in the area of the newly installed facilities.~~document the mark--out 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.~~

(10) ~~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.~~

If a company receives notification of an excavation from the Dig Safe Center and has no underground facilities to mark, it shall inform the excavator or otherwise indicate the absence of underground facilities at the excavation location.

99.07: Excavation

(1) The excavation may not commence within 72 hours after notification to the Dig Safe Center.

(2) A Dig Safe ticket shall be valid for 30 calendar days from the date of notification to the Dig Safe Center, as long as the markings remain clear and discernible.

(3) ~~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~~When excavating in close proximity to the underground facilities of any company, nonmechanical means shall be employed, as necessary, to avoid damage in locating such facility, and any further excavation shall be performed employing reasonable precautions to avoid damage to any underground facilities including, but not limited to, any substantial weakening of structural or lateral support of such 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, mechanical means may only be used for the initial penetration of pavement, rock or other such materials, so long as nonmechanical means are employed after the paving, rock or other such material has been penetrated.

~~(1)~~(4) ~~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.

~~(2)~~(5) If an excavator requests remarking, it shall suspend the excavation in the area for which it requested the remarking for 24 hours.

~~(3) 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.~~

~~(4)~~(6) 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 suspend ~~not begin~~ excavating until notifying the Dig Safe Center and shall protect the facility.

~~(5)~~(7) 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~~.

~~(6)~~(8) 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)~~(d) ~~Call 811 or otherwise notify the Dig Safe Center~~; and

~~(f)~~(e) Report the damage to the Department within 30 days using a form deemed necessary and appropriate by the Department.

~~(7)~~(9) Any person who causes damage to ~~makes contact with~~ any underground facility or becomes aware of such damage must notify the company owning the facility at the earliest practical moment following such contact.

~~(8)~~(10) Every company or excavator 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;
   (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), without good cause, 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.

(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.

(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. c. 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.

~~(4)~~(5) The Department may, at its discretion, refer damage prevention matters to the Office of Public Safety and Inspections.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

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) Violation Relating ~~Damage~~ to Natural Gas Pipeline Facilities. 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).

(2) Violation Relating to Facilities Other Than Natural Gas Pipelines. 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.

~~(2)~~(3) Criteria for Determining Amount of Civil Penalty. In determining the amount of the civil penalty under 220 CMR 99.14 (1) or (2), the Department ~~shall~~ may consider the following criteria~~, set forth in 49 CFR 190.225~~:

(a) The nature, circumstances, and gravity of the violation, including adverse impact on the environment;
(b) The degree of the respondent's culpability;
(c) The respondent's history of prior offenses;
(d) Any good faith by the respondent in attempting to achieve compliance after notification of a violation; ~~and~~
(e) The effect on the respondent's ability to continue in business;~~.~~

~~(f) The Department may also consider the following criteria set forth in 49 CFR 190.225:~~

~~(g)~~(f) The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and

~~(h)~~(g) Such other matters as justice may require.

~~(3) 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.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

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

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:

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, visible marking material, 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. 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.

Premark. To delineate the general scope of the excavation or boring using white (or pink, pursuant to 220 CMR 99.03(2)) paint on the paved surface of the ground, or using flags, stakes, or other suitable white (or pink, pursuant to 220 CMR 99.03(2)) marking on nonpaved surfaces.

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

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) 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, 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 preexisting 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 preexisting guardrail or fence, the excavator must premark only that area to be excavated that will differ from the preexisting guardrail or fence.

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.

(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 three 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) Once the emergency has been brought to conclusion, and if further excavation is to be done beyond the premarked area, 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.

(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) 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.

(7) 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.

(8) 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.

(9) Upon installing any new underground facilities or part thereof, the company shall mark out the location of the newly installed facilities as they are backfilled or installed, and document the mark-out of the newly installed facilities.

(10) If a company receives notification of an excavation from the Dig Safe Center and has no underground facilities to mark, it shall inform the excavator or otherwise indicate the absence of underground facilities at the excavation location.

99.07: Excavation

(1) The excavation may not commence within 72 hours after notification to the Dig Safe Center.

(2) A Dig Safe ticket shall be valid for 30 calendar days from the date of notification to the Dig Safe Center, as long as the markings remain clear and discernible.

(3) When excavating in close proximity to the underground facilities of any company, nonmechanical means shall be employed, as necessary, to avoid damage in locating such facility, and any further excavation shall be performed employing reasonable precautions to avoid damage to any underground facilities including, but not limited to, any substantial weakening of structural or lateral support of such 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, mechanical means may only be used for the initial penetration of pavement, rock or other such

materials, so long as nonmechanical means are employed after the paving, rock or other such material has been penetrated.

(4) 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.

(5) If an excavator requests remarking, it shall suspend the excavation in the area for which it requested the remarking for 24 hours.

(6) 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 suspend excavating until notifying the Dig Safe Center and shall protect the facility.

(7) An excavator shall not remove an abandoned underground facility without first receiving authorization and direction from the company owning the facility.

(8) 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; and
- (e) Report the damage to the Department within 30 days using a form deemed necessary and appropriate by the Department.

(9) Any person who causes damage to any underground facility or becomes aware of such damage must notify the company owning the facility at the earliest practical moment following such contact.

(10) Every company or excavator 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.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

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;
   (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), without good cause, 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.

(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.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

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.

(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. c. 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.

(5) The Department may, at its discretion, refer damage prevention matters to the Office of Public Safety and Inspections.

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) Violation Relating to Natural Gas Pipeline Facilities. 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).

(2) Violation Relating to Facilities Other Than Natural Gas Pipelines. 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.

(3) Criteria for Determining Amount of Civil Penalty. In determining the amount of the civil penalty under 220 CMR 99.14 (1) or (2), the Department may consider the following criteria:
(a) The nature, circumstances, and gravity of the violation, including adverse impact on the environment;
(b) The degree of the respondent's culpability;
(c) The respondent's history of prior offenses;

(d) Any good faith by the respondent in attempting to achieve compliance after notification of a violation;
(e) The effect on the respondent's ability to continue in business;
(f) The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and
(g) Such other matters as justice may require.

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.