

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

220 CMR 69.00 PROCEDURES FOR THE DETERMINATION AND ENFORCEMENT OF VIOLATIONS OF SAFETY CODES PERTAINING TO PIPELINE FACILITIES, TRANSPORTATION OF NATURAL GAS, LIQUEFIED NATURAL GAS FACILITIES, AND STEAM DISTRIBUTION FACILITIES

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69.01: Purpose and Scope

220 CMR 69.00 establishes the procedure for determining the nature and extent of violations of codes, regulations, or rules adopted or enforced by the Department of Public Utilities (Department) pertaining to the safety of pipeline facilities, the transportation of natural gas, liquefied natural gas facilities, and steam distribution facilities, including but not limited to, 220 CMR 20.00 and 101.00 through 115.00, and all applicable federal pipeline safety standards that the Department has the authority to enforce, including the following: federal pipeline safety standards as set forth in 49 CFR Part 192; federal safety standards for liquefied natural gas (LNG) as set forth in 49 CFR Part 193; and federal drug and alcohol testing standards as set forth in 49 CFR Parts 40 and 199. 220 CMR 69.00 shall apply to violations of these state codes and these federal codes that occur at a time when the Department has submitted and has in effect the annual certification to the United States Secretary of Transportation provided for in 49 U.S.C. § 60105, pursuant to the provisions of M.G.L. c. 164, § 105A.

69.02: Inspections

Officers, employees, or agents authorized by the Commission of the Department (Commission) or its designee, upon presenting appropriate credentials, are authorized to enter upon, inspect and examine, at reasonable times and in a reasonable manner, the records and properties of gas companies, municipal gas departments, and steam distribution companies to the extent such records and properties are relevant to determining compliance with 220 CMR 20.00, 101.00 through 115.00, and 49 CFR Parts 40, 192, 193 and 199. The facilities, reports, and records needed to ensure such compliance shall be accessible to

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the Department for such inspections. Each gas company, municipal gas department, or steam distribution company shall provide the Department with such reports, supplemental data, and information as the Department may request for the enforcement and administration of 220 CMR 69.00, except that said companies and departments need not provide the Department with copies of security procedures for a facility, if such security procedures are made available at the facility for review and inspection by the Department.

69.03: Commencement of Enforcement Proceedings

- (1) Warning Letters. Upon determining that a probable violation of 220 CMR 20.00, 101.00 through 115.00, or 49 CFR Parts 40, 192, 193 and 199 has occurred or is occurring, the Department may issue a warning letter notifying the owner or operator of the probable violation and advising the owner or operator to correct it or be subject to enforcement action under 220 CMR 69.03(2) through 69.09. No such warning letter will be deemed to be based on a finding or adjudication by the Department that a violation exists, nor will it constitute evidence that a violation exists.
- (2) Notice of Probable Violation. The Department may begin an enforcement proceeding by issuing a notice of probable violation (NOPV) if the Department has reason to believe that a violation of 220 CMR 20.00, 101.00 through 115.00, or 49 CFR Parts 40, 192, 193 and 199 has occurred or is occurring. The NOPV may be issued by the Commission or its designee. The NOPV shall state the provision(s) of the codes, regulations or rules which the respondent is alleged to have violated and the evidence upon which the allegations are based, shall give notice of response options available to the respondent under 220 CMR 69.04, and, if a civil penalty is proposed, shall state the amount of the proposed civil penalty and the maximum civil penalty for which the respondent may be liable under law.

69.04: Response Options

- (1) Within 30 days of receipt of an NOPV, the respondent shall respond to the Department in one of the following ways:
 - (a) Return the signed Consent Order and agree to pay the proposed civil penalty by check or money order made payable to the Commonwealth of Massachusetts;
 - (b) Submit an offer in compromise of the proposed civil penalty under 220 CMR 69.04(2);
 - (c) Request an informal conference under 220 CMR 69.05; or
 - (d) Submit a written reply to the Department disputing the violation(s) in the NOPV. The reply must include a complete statement of all relevant facts and authority and full description of the reasons why the respondent disputes the violation(s) alleged in the NOPV.
- (2) An offer in compromise under 220 CMR 69.04(1)(b) is made by submitting a check or money order for the amount offered, payable to the Commonwealth of

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Massachusetts, to the Department. A respondent making an offer in compromise shall also submit written explanations, information, or other materials which may justify the Department's acceptance of the offer in compromise. If an offer in compromise is accepted by the Department, the respondent shall be notified in writing that the acceptance is in full settlement of the civil penalty action. If an offer in compromise is rejected by the Department, the check or money order shall be returned to the respondent with written notification. Within ten days of receipt of such notification, the respondent may request an informal conference under 220 CMR 69.05, or submit a written reply under 220 CMR 69.04(1)(d).

- (3) Failure of the respondent to respond to the NOPV in accordance with 220 CMR 69.04 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 final order.

69.05: Informal Review

- (1) The informal review shall be conducted by an investigator designated by the Commission. The informal review shall consist of an informal conference, if the respondent has chosen this option under 220 CMR 69.04(1)(c), or an analysis of the respondent's written reply under 220 CMR 69.04(1)(d).
- (2) 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 to the investigator. The investigator shall make available to the respondent any evidence which indicates that the respondent may have violated any provision of 220 CMR 20.00, 101.00 through 115.00, or 49 CFR Parts 40, 192, 193 and 199, and the respondent or the respondent's representative shall have the opportunity to rebut this evidence. However, this informal conference shall not be construed to be an adjudicatory hearing for purposes of M.G.L. c. 30A.
- (3) The investigator shall make a decision in writing. If the respondent is not satisfied with the decision, the respondent may request an adjudicatory hearing, in writing, within seven days of the date of the decision. Failure to request an adjudicatory hearing within the time allowed will be deemed an admission of the factual allegations and legal conclusions stated in the investigator's decision, and the respondent shall be held liable to pay the civil penalty designated in the NOPV and to comply with a remedial order issued under 220 CMR 69.07.

69.06: Adjudicatory Hearing

- (1) The adjudicatory hearing shall be a *de novo* hearing and shall be an adjudicatory hearing for purposes of M.G.L. c. 30A, and shall be conducted pursuant to 220 CMR 1.00: *Procedural Rules*.

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- (2) At the adjudicatory hearing, the respondent shall have the right to be represented by an attorney or other representative.
- (3) If the Department finds, after the adjudicatory hearing, that the respondent has violated any provision of 220 CMR 20.00, 101.00 through 115.00, or 49 CFR Parts 40, 192, 193 and 199, it may issue a remedial order pursuant to 220 CMR 69.07.

69.07: Remedial Orders

- (1) If the Department finds that a violation has occurred or is occurring, it may issue a remedial order. The remedial order shall include a written opinion setting forth the factual and legal basis of the findings and shall direct any party to take or refrain from taking any action, including the payment of a fine or civil penalty provided by law.
- (2) A remedial order issued by the Commission or its designee under 220 CMR 69.07 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 Commission within the meaning of M.G.L. c. 25, § 5, and subject to review by the Supreme Judicial Court.
- (4) If the respondent fails either to appeal a remedial order to the Supreme Judicial Court or to comply fully with the order within 20 days after issuance of the order, 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 collection of assessed penalties.

69.08: Consent Orders

- (1) Notwithstanding any other provision to the contrary, the Department may at any time resolve an outstanding enforcement issue 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 69.07.
- (3) A consent order shall not be appealable and shall include an express waiver of appeal or judicial review rights that might otherwise attach to a final order of the Department.

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69.09: Civil Penalties

The determination of the amount and appropriateness of a civil penalty shall be made pursuant to M.G.L. c. 164, § 105A.

69.10: Hazardous Facility Orders

- (1) Except as provided by 220 CMR 69.10(2), if the Department finds, after reasonable notice and opportunity for hearing in accord with 220 CMR 69.10(3), a particular pipeline facility, LNG facility, or steam distribution facility to be hazardous to life or property, it shall issue an order pursuant to 220 CMR 69.10 requiring the owner or operator of the facility to take corrective action. Corrective action may include suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other action, as appropriate.
- (2) The Department may waive the requirement for notice and hearing under 220 CMR 69.10(1) before issuing an order pursuant to 220 CMR 69.10 when the Commission or its designee determines that failure to do so would result in the likelihood of serious harm to life or property. However, the Department shall include in the order an opportunity for hearing as soon as practicable after issuance of an order. The provisions of 220 CMR 69.10(3)(a) apply to an owner or operator's decision to exercise such an opportunity for hearing. The purpose of such a post-order hearing is for the Department to determine whether the order should remain in effect or be rescinded or suspended in accordance with 220 CMR 69.10(7).
- (3) Notice and Hearing:
 - (a) Written notice that the Department intends to issue an order under 220 CMR 69.10(3) shall be served upon the owner or operator of an allegedly hazardous facility. The notice shall allege the existence of a hazardous facility, stating the facts and circumstances supporting the issuance of a hazardous facility order, and providing the owner or operator an opportunity for a hearing, identifying the time and location of the hearing.
 - (b) An owner or operator may exercise the opportunity for a hearing under 220 CMR 69.10 by notifying the Department of that election in writing within ten days of service of the notice provided under 220 CMR 69.10(3)(a), or, when applicable, under 220 CMR 69.10(2). Absence of such written notification waives an owner or operator's opportunity for a hearing and allows the Department to proceed to issue a "hazardous facility order" in accordance with 220 CMR 69.10(4) through (7).
 - (c) A hearing under 220 CMR 69.10 shall be an adjudicatory proceeding as defined in M.G.L. c. 30A. The owner or operator of the allegedly hazardous facility shall have the right to be represented by an attorney at this hearing.
 - (d) If the Department finds the facility to be hazardous to life or property, the Department shall issue an order in accordance with 220 CMR 69.10. If it does not find the facility to be hazardous to life or property, the Department

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shall dismiss the allegations contained in the notice, and promptly notify the owner or operator in writing.

- (4) The Department may find a pipeline facility, LNG facility, or steam distribution facility to be hazardous under 220 CMR 69.10(1):
 - (a) If, under the facts and circumstances, the Department determines that the particular facility is hazardous to life or property; or
 - (b) If the facility or a component thereof has been constructed, operated, or maintained with any equipment, material or technique which the Department determines is hazardous to life or property, unless the operator involved demonstrates to the satisfaction of the Department that, under the particular facts and circumstances involved, such equipment, material or technique is not hazardous to life or property.
- (5) In making a determination under 220 CMR 69.10(4), the Department shall consider, if relevant:
 - (a) The characteristics of the pipe, components, and other equipment used in the pipeline facility, LNG facility, or steam distribution facility involved, including its age, manufacturer, physical properties (including its resistance to corrosion and deterioration), and the method of its manufacture, construction or assembly;
 - (b) The nature of the materials transported by such facility (including their corrosive and deteriorative qualities), the sequence in which such materials are transported, and the pressure required for such transportation;
 - (c) The aspects of the areas in which the facility is located, in particular, the climatic and geologic conditions (including soil characteristics) associated with such areas, and the population density and population and growth patterns of such areas; and
 - (d) Such other factors as the Department may consider appropriate.
- (6) The hazardous facility order shall contain the following information:
 - (a) A finding that the pipeline facility, LNG facility, or steam distribution facility is hazardous to life or property.
 - (b) The relevant facts which form the basis for that finding.
 - (c) The legal basis for the order.
 - (d) The nature and description of particular corrective action(s) required of the respondent.
 - (e) The date by which the required action(s) must be taken or completed, and, where appropriate, the duration of the order.
 - (f) If a hearing has been waived pursuant to 220 CMR 69.10(2), a statement that an opportunity for a hearing is provided at a particular location and at a certain time after issuance of the order.
- (7) The Department shall rescind or suspend a hazardous facility order whenever it determines that the facility is no longer hazardous to life or property.

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- (8) At any time after an order issued under 220 CMR 69.10 has become effective, the Department may request the Attorney General to bring an action for appropriate equitable relief in the Supreme Judicial Court or the Superior Court, as provided in M.G.L. c. 164, § 79.

REGULATORY AUTHORITY

220 CMR 69.00: M.G.L. c. 164, §§ 66, 76, 76C and 105A; M.G.L. c. 164B, §§ 1 and 2.