

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

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99.01: Purpose and Scope

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

99.02: Definitions

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

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.

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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 non-paved 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.

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(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.

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- (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.

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- (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.

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.

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(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.
- (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 M.G.L. c. 164, § 105A.
- (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;

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- (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 and 60114; 49 CFR Parts 192, 196 and 198; M.G.L. c. 82, §§ 40 through 40E; M.G.L. c. 164, §§ 66, 76, 76C, 76D and 105A.