



# The Commonwealth of Massachusetts

## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 19-43

July 18, 2019

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

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### ORDER ADOPTING EMERGENCY REGULATIONS

## I. INTRODUCTION

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to establish more efficient procedures for the enforcement of violations; and (c) to correct minor errors and delete outdated, duplicative, or unnecessary information.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

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

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

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

## II. DIG SAFE LAW/REGULATION COORDINATION WITH FEDERAL CODE

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

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

See 49 C.F.R. Parts 192, 196, 198.

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

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

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

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

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

### III. OTHER REVISIONS TO 220 CMR 99.00

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

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

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

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

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

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

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

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

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

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

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

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

Sixth, in an effort to clarify when mechanical means may be used within the safety zone, the Department adds the following language to the Excavation Section, 220 CMR 99.07(1):

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

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

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

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

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

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

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

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

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

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

#### IV. ADOPTION OF THE REGULATIONS

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

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

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

V. **SOLICITATION OF COMMENTS**

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

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

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

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

VI. ORDER

Accordingly, it is

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

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

By Order of the Department,

/s/

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Matthew H. Nelson, Chair

/s/

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Robert E. Hayden, Commissioner

/s/

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Cecile M. Fraser, Commissioner