The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

April 27, 1999

D.T.E. 98-109

Investigation by the Department on its own motion regarding amendment of the present regulations, 220 C.M.R. 99.00 et. seq., which set forth the procedures for the enforcement of G.L. c. 82, §40 ("Dig Safe Law").

I. INTRODUCTION

On December 4 and 5, 1998, the Department of Telecommunications and Energy ("Department") published notice that it was initiating rulemaking proceedings to amend the present regulations, 220 C.M.R. 99.00 et. seq., in response to recent amendments to G.L. c. 82, § 40, otherwise known as the "Dig Safe law". The Dig Safe law requires excavators to premark and notify the underground plant damage prevention system ("Dig Safe Center") of their intent to excavate, before commencing excavation over facilities operated by public utility companies, municipal gas and electric departments, petroleum or petroleum products pipeline companies, private water companies, cable television companies, interstate natural gas pipeline companies and petroleum pipeline companies. Anyone violating the Dig Safe law, whether by failure to notify the Dig Safe Center in a timely fashion, by failure to premark the scope of the excavation, or by failure to mark the facilities, or otherwise, is liable to pay a civil penalty assessed by the Department.[1] The amended Dig Safe law went into effect on or about December 17, 1998.

The proposed regulations issued for comment were intended to accomplish several things: (1) to clarify the law by providing additional definitions; (2) to describe notification requirements, premarking procedures, marking procedures and reporting requirements; and (3) to set forth standards for assessing civil penalties for violations of the law and the implementing regulations.

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[1] G.L. c. 82, § 40E exempts state and local government bodies from forfeiture of any penal sum. This section also exempts residential property owners from forfeiture of penal sums for failure to premark for an excavation on such person's residential property.

A public hearing on the proposed regulations was held on January 4, 1999. Additional written comments were received until January 14, 1999. The Department received written comments from the following: Boston Edison Company ("Boston Edison"); Boston Gas Company ("Boston Gas"); Construction Industries of Massachusetts ("CIM"); Robert Cronin; Eastern Edison Company ("Eastern Edison"); Enstrat Strategic Environmental Services ("Enstrat"); Senator Cheryl A. Jacques; Massachusetts Electric Company and Nantucket Electric Company ("Mass. Electric"); RCN-BECOCom, LLC ("RCN"); Southeastern Regional Services Group ("SERSG"); and Utility Contractors' Association of New England, Inc. ("UCANE"). The Department has reviewed the comments filed on behalf of these parties concerning the proposed regulations contained in this docket, and today promulgates final rules amending the Dig Safe regulations, 220 C.M.R. 99.00 et. seq.

II. COMMENTS ON PROPOSED REGULATIONS

A. Premarking

1. Premarking Sites over 500 Feet in Length

a. Comments

Boston Edison and Eastern Edison recommend that, for continuous excavations over 500 feet in length, premarking should be required for the first 500 feet (Boston Edison Comments, p. 2; Eastern Edison Comments, p.1). CIM requests that continuous excavations over 100 feet, rather than over 500 feet in length, be exempted from premarking requirements (CIM Comments, p.1).

b. Analysis and Findings

The language in the Dig Safe law is unclear with regard to premarking a continuous site

over 500 feet in length. Under the definition of "premark" it states, "[p]remarking shall not be required of any continuous excavation that is over 500 feet in length." G.L. c. 82, § 40. Section 40A however, contains the following language, "[n]o excavator installing a new facility . . . shall . . . make an excavation . . . unless . . . before the excavation is to be made, such excavator has premarked not more than 500 feet of the proposed excavation . . . ." G.L. c. 82, §40A.

We can see no added safety benefit in requiring a portion of an excavation site to be premarked, while exempting the rest. For such large excavations, detailed notice to the Dig Safe Center should sufficiently inform a utility company of the area to be excavated. It is the opinion of the Department that it was the intent of the legislature to exempt continous excavations over 500 feet in length from the premarking requirement. Therefore, the Department finds that, for excavations over 500 feet in length, no premarking is required.

In light of this finding, the Department rejects the proposals of Boston Edison, Eastern Edison, and CIM.

2. Premarking Where White Marks Inappropriate

a. Comments

Eastern Edison states that an excavator should use an alternate color when premarking an area in which white markings may interfere with traffic or pedestrian control (Eastern Utilities Comments, p. 1).

b. Analysis and Findings

The Department is in agreement with Eastern Edison that there is a need for an alternate color when premarking areas in which white will cause confusion or may not easily

be seen. Accordingly, the Department finds that, when premarking in an area where white marks may not easily be seen or may create confusion, such as near pavement, or crosswalks, or when marking very large sites where finding premarks may be more difficult, the excavator should consider using an alternate color in order to eliminate confusion. The excavator, however, must inform the Dig Safe Center in the notice that an alternate color has been used.

3. Premarking Guardrails and Fences

a. Comments

The new Dig Safe statute requires premarking by an excavator. G.L. c. 82, § 40A. It is recommended by CIM that when excavating to replace a guardrail or fence, the preexisting guardrail or fence should be able to be used as a premark (CIM Comments, p. 1).

b. Analysis and Findings

The Department is of the opinion that guardrails and fences that are being identically replaced may serve as a premark. The Department finds that when a guardrail or fence replacement is collinear with the original, the pre-existing guardrail or fence may be used as a premark. If the path of the new guardrail or fence, however, differs from the original guardrail or fence pathway, an excavator must premark that area to be excavated which will differ from the pre-existing guardrail or fence.

4. Premarking Before Notifying Dig Safe

a. Comments

Mass. Electric suggests that an excavator must complete premarking prior to notifying the Dig Safe Center (Mass. Electric Comments, p. 1).

b. Analysis and Findings

The Department agrees with Mass. Electric that an excavator should complete premarking before notifying the Dig Safe call center. Once a utility company receives the notice of excavation from Dig Safe, it must mark the site within 72 hours. Allowing excavators to premark after they notify Dig Safe would increase the risk of a utility company arriving to mark a site that has not yet been premarked. A requirement that a premark be completed before notifying the Dig Safe Center is in the best interests of the excavator. The Department believes it was the legislature's intent to require premarking to be in place before notice is given. Accordingly, the Department finds that an excavator must premark a site before notifying Dig Safe.

5. Premarking Septic Systems

a. Comments

Senator Jacques recommended that workers emptying septic systems on private residential land should be exempt from Dig Safe premarking and notice requirements. Senator Jacques stated that such activity takes place periodically at a fixed location, and involves digging with hand-tools between six and nine inches deep. The Senator points out that under the Dig Safe law, gardeners are allowed to dig with hand-tools without having to premark the area; the Senator states that because septic maintenance work is so similar in this respect to gardening, septic maintenance on residential property should be exempt from the premarking and notice requirements.

b. Analysis and Finding

Septic maintenance is a repetitive activity; over the course of years, it takes place at the

same location on a residential property. According to Senator Jacques, and comments made at the public hearing, the only digging conducted when septic tanks are emptied is with the use of hand-tools and goes no deeper than six to nine inches in the ground. This activity is comparable enough to gardening on residential property that no premark is necessary. Accordingly, the Department finds that when a septic maintenance worker conducts service on a septic tank requiring only the removal of the septic tank's cap, and uses hand-tools to dig no deeper than six to nine inches in the ground, at a fixed location, the activity is exempted from premarking and notice requirements.

B. Marking

1. Comments

Boston Gas recommended that the corridor method of marking be adopted as the standard for the Commonwealth, and the center line method of marking be eliminated (Boston Gas Comments, p. 2). Boston Gas stated that the corridor method of marking better protects public safety than does centerline marking because two marks made on the ground's surface makes clear to the excavator where the facility is located, while the center line method leaves it up to the excavator's discretion whether to measure or estimate where the facility might be located (Boston Gas Comments, p. 2).

2. Analysis and Finding

The center line method, a nationally recognized standard, is promoted by the American Public Workers' Association. It provides the necessary information that an excavator needs, that is, the width, material, and location of an underground facility. The Department appreciates Boston Gas' concern for safety. However, the Department is of the opinion that

eliminating the center line method and using only the corridor method is a variance from the industry standard that would increase the risk of damage and serious injury. Therefore, the Department takes this opportunity to align the Commonwealth's Dig Safe regulations with the industry standard. Accordingly, the Department finds that the center line method is now the only method accepted for marking underground facilities, and the Department hereby eliminates the corridor method as an accepted method of marking.

C. Marking on Private Property

1. Comments

Enstrat inquires whether the new regulations require utility companies to mark on private property within 15 feet of a premarked area, since previously, according to Enstrat, utility companies refused to mark on private property (id. at 2).

2. Analysis and Findings

With regard to a company's responsibilities, the Dig Safe law makes no distinction between marking on private or public property. The Dig Safe law applies to both situations. While most electric distribution companies do not operate privately-owned service lines, such companies are required to mark underground facilities under their ownership, whether on private property or not, just as other companies with underground facilities. Accordingly, the Department finds that a company, when notified by the Dig Safe Center of an impending excavation, shall accurately mark its underground facilities, in accordance with the requirements herein, regardless whether the site is located on private or public property.

D. Chasing a Plume

1. Comments

Enstrat commented that it often positions drilling locations to "chase a plume" of contamination based upon information gathered on the day of excavation (Enstrat's Comments, p. 1). Enstrat comments that the new regulations will create significant difficulty in drilling because such plumes may spread outside a premarked area, thereby requiring another call to Dig Safe, and down time as the excavator waits the required 72 hour period before continuing excavation (id.).

2. Analysis and Finding

The Department finds that a company should premark and notify the Dig Safe Center of as large an area as needed to take into account such possible movement of the excavation. Under section 99.02, the definition of premarking states, "to delineate the general scope of the excavation or boring on the paved surface of the ground using white paint, or stakes or other suitable white marking on nonpaved surfaces." 220 C.M.R. 99.02. By giving notice of excavation and premarking a large enough area, excavators should be able to move about the site during a day's excavation. Should the plume be of a containment which could jeopardize public health, and/or a water supply, the premark and notification may be classified as an emergency.

E. Excavation

1. Comments

RCN suggested clarification regarding non-mechanical excavations in § 99.06 (RCN's Comments, p. 2). RCN noted that it is often necessary to use mechanical means to penetrate

initially a paved or rock surface, and that non-mechanical means can then be employed beyond such initial excavation (id.).

2. Analysis and Findings

The Department agrees with RCN that such clarification is needed. Accordingly, the Department finds that when excavating in close proximity to any underground facilities, mechanical means may be used for the initial penetration of pavement or rock, or other such material, and non-mechanical means shall be used after the initial material is penetrated until the excavator locates the underground facility.

F. Informal Review Process

1. Comments

UCANE suggested that informal decisions should be mailed to the respondent by overnight mail, return receipt requested (UCANE Comments, p. 1). This organization also recommended that the time period in which to request an adjudicatory hearing be extended from seven to ten days (id.). UCANE suggested the language in the regulations that failure to respond to a Department decision is deemed an admission should be removed (id.).

2. Analysis and Finding

UCANE provided no argument to support its request that informal review decisions be sent by overnight mail, and the Department sees no reason for this amendment to the regulations. The Department does find UCANE's recommendation that decisions be mailed return receipt requested helpful in that it would provide confirmation whether or not a respondent received the decision. Accordingly, the Department finds that decisions in informal reviews of Notices of Probable Violations should be sent return receipt requested to the

respondent. The Department agrees with UCANE that the time period in which to request an adjudicatory hearing should be extended from seven days to ten days. The ten-day period will ensure that a respondent, after receiving the decision of the informal review by mail, has sufficient time to decide whether or not to request an adjudicatory hearing. The Department finds that, after an informal review decision has been issued, a respondent has 10 days from the date of receipt in which to request an adjudicatory hearing.

Also, UCANE provided no argument to support its request that the Department remove from the regulations language that failure to respond to a decision is deemed an admission be removed. The Department finds no reason for such a change to the regulations.

G. Abandoned Lines

1. Comments

SERSG commented that there are abandoned mains, usually gas mains, in the public ways which are not required to be marked prior to excavations (SERSG Comments, p. 1). SERSG states that abandoned mains pose a problem to an excavator who uncovers one because the excavator will not know if the main is abandoned or not (id.). To address this issue, SERSG recommends that the Department require abandoned mains and conduits buried under public ways be removed when they are replaced by new facilities (id. at 2). SERSG also recommends that the Department require companies with abandoned mains to mark them as such after completing a review of their historical records in order to create a database and map of such mains (id.). SERSG recommends a Department requirement that companies keep complete and accurate records of their distribution system available to cities and towns, as well as a requirement that companies sponsor training for municipal highway and fire department

personnel regarding what to do in the event of a broken main or conduit (id.).

2. Analysis and Findings

The Department notes that SERSG's comments appear to regard a subject worth further discussion. The topic of these comments, however, is beyond the scope of this rulemaking proceeding. Accordingly, the Department makes no finding with regard to SERSG's recommendations on the subject of abandoned mains and conduit. The Department notes, however, that Section 99.05(2) of the regulations requires utility companies to indicate the width and material of the underground facility when marking. This requirement may enable excavators to differentiate between live and abandoned utilities.

III. ORDER

Accordingly, after notice, hearing and consideration, it is hereby

ORDERED: That 220 C.M.R. 99.00 et. seq. be amended to incorporate the changes contained in this Order, appended hereto, and that such regulations, as revised, be effective upon publication in the Massachusetts Register; and it is

FURTHER ORDERED: That the Secretary of the Department attest to a true copy of the regulations and transmit said attested true copy to the Office of the Secretary of State for the Commonwealth for publication in the Massachusetts Register for inclusion in the Code of Massachusetts Regulations and that said 220 C.M.R. 99.00 et. seq. shall be effective upon publication in the Massachusetts Register.

By Order of the Department

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

A true copy
Attest:
MARY L. COTTRELL
Secretary

220 C.M.R. 99.00: PROCEDURES FOR THE DETERMINATION AND ENFORCEMENT OF VIOLATIONS OF M.G.L. c. 82, s. 40 ("DIG SAFE").

Section

99:01: Purpose And Scope

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

(2) Every gas, electric and telephone company, municipal gas or electric department, natural gas pipeline company, petroleum or petroleum products pipeline company, private water company and cable television company shall report all suspected violations of M.G.L. c. 82, s. 40, to the Department of Telecommunications and Energy ("Department") within thirty (30) days of learning of the circumstances constituting the suspected violation. Any other person may report a suspected violation of M.G.L. c. 82, s. 40 to the Department. All such reports shall be in a form deemed appropriate and necessary by the Department.

99:02: Definitions

Center line method shall mean the method for identifying the location of an underground facility by placing marks on the surface above the center line of the facility.

Company shall mean any natural gas pipeline company, petroleum or petroleum products pipeline company, public utility company, cable television company, municipal utility company or department that supplies gas, electricity, telephone, communication or cable television services or private water companies within the city or town where such excavation is to be made.

Description of excavation location shall include: the name of the city or town where the excavation will take place; and the name of the street, way, or route number where appropriate; and the name of the streets at the nearest intersection to the excavation; and the number of the buildings closest to the excavation; and/or any other description which will accurately define the excavation location, including landmarks and utility pole numbers; and the date and location of any blasting.

Emergency shall mean a condition in which the safety of the public is in imminent danger, such as a threat to life or health or where immediate correction is required to maintain or restore essential pubic utility service.

Excavation shall mean an operation for the purpose of movement or removal of earth, rock or the materials in the ground, including but not limited to, digging, blasting, augering, backfilling, test boring, drilling, pile driving, grading, plowing in, hammering, pulling in, jacking in, trenching, tunneling and demolition of structures, excluding excavation by tools manipulated only by human power for gardening purposes and use of blasting for quarrying purposes.

Excavator shall mean any entity including, but not limited to, a person, partnership, joint venture, trust, corporation, association, public utility, company or state or local government body which performs excavation operations.

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

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

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

Safety zone shall mean a zone containing the width of the facilities plus not more than eighteen (18) inches on each side and designated on the surface by the use of standard color-coded markings.

Standard color-coded markings shall mean the following color code which shall be used for the placement of marks:

(1) red - electric power lines, cables, conduit or light cables;
(2) yellow - gas, oil, petroleum, steam or other gaseous materials;
(3) orange - communications cables or conduit, alarm or signal lines;
(4) blue - water, irrigation and slurry lines;
(5) green - sewer and drain lines;
(6) white - premark of proposed excavation.

System shall mean the underground plant damage prevention system as defined in M.G.L. c. 164, s. 76D.

99.03: Premarking

(1) Premarking shall occur before an excavator has given notice of excavation to the system.

(2) When premarking in an area where white marks may interfere with traffic or pedestrian control, or when white marks might otherwise be difficult to see, the excavator should consider using an alternate color, other than a color listed as a standard color code marking under § 99.02, and must inform the Dig Safe Center in the notice that an alternate color has been used.

(3) When excavating to replace a guardrail or fence, an excavator may use the pre-existing guardrail or fence as the premark. 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.

99.04: Excavation Notification

(1) Notice of a excavation shall be tendered to the system at least seventy-two (72) hours, exclusive of Saturdays, Sundays or holidays, but not more than thirty (30) days prior to the commencement of an excavation. Such notice shall include a description of the excavation location and the date the excavation is expected to begin.

(2) In an emergency, the excavator may commence excavating after having taken all reasonable steps, consistent with the emergency, to notify the system and premark the excavation site.

(3) Each company shall establish standard operating procedures to identify the location of its respective underground facilities as soon as practicable after receiving notification of an emergency excavation whether or not the excavation has begun.

(4) Circumstances requiring emergency excavation shall not excuse the excavator from the requirement to use all reasonable means to avoid damage to an underground facility.

(5) Emergency Dig Safe markings are invalid after the cessation of the emergency. Further excavation at the location shall require notice as set forth in subsection (1) and premarking.

(6) 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. If any such notice cannot be given as aforesaid because of an emergency requiring blasting, it shall be given as soon as may be practicable but before any explosives are discharged.

99.05: Marking Procedures

(1) Every company shall use the center line method to identify the location of its respective underground facilities. The underground facility shall be completely located within a safety zone no more than eighteen (18) inches plus the width of the facility from the designated center line.

(2) All markings shall indicate, where practicable, the width, if it

is greater than two (2) inches, and material of the underground facility, as well as any change in direction and any terminus points of the facility.

(3) Marking shall extend at least fifteen (15) feet beyond the boundaries of the premarked area.

(4) Within 72 hours, exclusive of Saturdays, Sundays and legal holidays, from the time initial notice is received by the system or at such time as the company and excavator agree, every company shall mark the location of an underground facility by applying a visible fluid, 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.

(5) 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.

(6) The color code listed under § 99.02 shall be used for the placement of marks whether by visible fluid or alternative marking methods.

(7) 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.

(8) After a company has marked the location of its facilities, the excavator shall be responsible for maintaining the markings at such locations unless such excavator, after premarking, requests remarking at the location due to the obliteration, destruction or other removal of such markings. The company shall then remark such location within 24 hours following receipt of such request.

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

(a) the excavation does not commence within thirty (30) days of the notification;
(b) the markings become faded, illegible or destroyed;
(c) a company installs new underground facilities in a marked area still under excavation; and/or
(d) an emergency condition is brought to conclusion which nullifies any markings installed during the emergency.

99.06: Excavation

(1) When excavating in close proximity to the underground facilities of any company, non-mechanical 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.

(2) If an excavator damages a company's underground facility, or has reason to believe that a company's underground facility may be damaged or compromised in any way as a result of the excavator's actions, the excavator must notify the company as soon as possible.

99.07: Notice Of Probable Violation: Commencement Of Enforcement Proceedings

(1) The Department may begin a proceeding by issuing a notice of probable violation ("NOPV") if the Department has reason to believe that a violation of M.G.L. c. 82, s. 40, has occurred or is occurring. The NOPV shall be issued by the Commission or its designee. The NOPV shall state the factual basis for the allegation of a violation and the amount of the civil penalty which may be assessed against the person served ("respondent") if the Department finds that the violation has occurred. The NOPV shall state that the respondent has a right to reply in writing to the NOPV or to appear at an informal conference with the Department on a designated day which is at least twenty-one (21) days from the date of the NOPV.

(2) Any written reply must be filed with the Department on or before the day scheduled for the informal conference and must be signed by the respondent or the respondent's designee. It must include a complete statement of all relevant facts and authority, and full description of the reasons that the respondent disputes the violation alleged in the NOPV.

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

99.08: Informal Review

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

(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 M.G.L. c. 82, s. 40, 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 proceeding as defined in M.G.L. c. 30A.

(3) The investigator shall make a decision in writing, which will be sent to the respondent by mail, return receipt requested. If the respondent is not satisfied with the decision, the respondent may request an adjudicatory hearing, provided that such request is made in writing within ten (10) days of the date of receipt of the decision. Failure to request an adjudicatory hearing 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 investigator's decision through the issuance of a remedial order under 220 C.M.R. 99.10.

99.09: Adjudicatory Hearing

(1) The adjudicatory hearing shall be a de novo hearing and shall be an adjudicatory proceeding as defined in M.G.L. c. 30A, and conducted pursuant to 220 C.M.R. 1.00 (the Department's procedural regulations).

(2) At the adjudicatory hearing, the respondent shall have the right to be represented by an attorney or other person.

(3) If the Department finds, after the adjudicatory hearing, that the respondent has violated M.G.L. c. 82, s. 40, it may issue a remedial order pursuant to 220 C.M.R. 99.10.

(4) If the Division determines, or the Department finds, after the request for an adjudicatory decision has been filed, that the evidence supports a determination that the respondent violated M.G.L. c. 82, s. 40 in a respect not stated in the NOPV or decision of the investigator, the Division shall issue an NOPV with respect to the violation so determined or found.

99.10: Remedial Orders

(1) If the Department finds that a violation has occurred or is continuing, it may issue a remedial order. The remedial order shall include a written opinion setting forth the factual and legal basis of the Department's findings and shall direct any party to take any action which is consistent with said party's obligations under M.G.L. c. 82, s. 40, including the payment of a civil penalty as provided by said statute.

(2) A remedial order issued by the Department under 220 C.M.R. 99.10 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, s. 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 or to comply fully with the order within twenty (20) days, the Department may refer the case to the Attorney General with a request that an action be brought in the Superior Court to seek appropriate relief including, but not limited to, collection of assessed penalties.

99.11: 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 C.M.R. 99.10.

(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.

99.12: Civil Penalties

(1) Any person, contractor, excavator or company found by the Department to have violated any provision of the Dig Safe law or regulation adopted by the Department shall be subject to a civil penalty not to exceed $500 for the first offense and not less than $1,000 nor more than $5,000 for any subsequent offense. On a subsequent offense, if a respondent demonstrates a period of twelve (12) consecutive months from the date of the violation within which the Department has not found the respondent in violation of the Dig Safe law, the Department shall cite respondent the first offense civil penalty of $500.

(2) In determining the amount of the civil penalty, the Department shall consider the nature, circumstances and gravity of the violation; the degree of the respondent's culpability; the respondent's history of prior offenses; and the respondent's level of cooperation with the requirements of this regulation.

REGULATORY AUTHORITY

220 C.M.R. 99.00: M.G.L. c. 82, s. 40.

357 5

Consent Communication #3

A communication was received from the Dept. of Telecommunications and Energy, transmitting a motion regarding amendment of the present regulations, 220 C.M.R. 99.00 et seq. relative to the procedures for the enforcement of G.L.c. 82 Section 40 - Dig Safe Law.

In City Council May 10, 1999

Referred to the City Manager