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***California Underground Facilities Safe Excavation Board***  
***("Dig Safe Board")***

**August 10, 2020**

**Agenda Item No. 4 (Information Item) – Staff Report**

*Overview of the Enforcement Process*

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**PRESENTER**

Jason Corsey, Chief of Investigations

**SUMMARY**

At the Board's July meeting, an Enforcement Action Report was given to members during the Executive Officers report. In the Enforcement Action Report, members were informed that 13 Notices of Probable Violation had been mailed to respondents. The 13 Notices of Probable Violation (NOPVs) included 11 recommendations for the Board's mandatory education course and 2 recommended a financial penalty up to the maximum amount allowed under GC 4216. At the end of the report, several members expressed a desire for additional information concerning the NOPV. Members wanted to know who had received NOPVs, when the Board would have access to view them. Based on this discussion, staff presents an overview of the enforcement/hearing process and the rules that govern it.

**BACKGROUND**

The Board adopted Sections 4250-4258 of Title 19 of the California Code of Regulations which outline the enforcement hearing process. The course of the proceeding depends on a respondent's response choice to the NOPVs and their enforcement jurisdiction. Hearing dates and locations will be integrated into the Board's schedule, and NOPVs will be sent to coincide with hearing dates when the Board meets in the respondent's half of the State.

**OVERVIEW OF ENFORCEMENT PROCESS**

The enforcement process consists of the issuance of an NOPV, a 30-business day window for the recipient to respond to the NOPV, Board consideration of recipient responses (if any), and Board action. The process is as follows:

1. The NOPV packet is mailed to the Respondent. The packet includes:
  - The NOPV, which states the violation, response due date, recommended penalty and proposed hearing date.
  - A copy of the Dig Safe Board Report of Investigation

- The Response Options available to the Respondent
2. The respondent has 30 business days to respond in one of the following ways:
    - a) No Contest
    - b) Provide a written response contesting the violations or the penalty
    - c) Request an oral hearing to contest the violations or the penalty
    - d) Request the Dig Safe Board to make a recommendation to the respondent's regulator without comment (CSLB, OSFM, CPUC and Local Government Enforcement Jurisdiction Only)
    - e) Request formal hearing before an administrative law judge from the Office of Administrative Hearings (Dig Safe Board Enforcement Jurisdiction Only)
  3. If the Respondent's response is "No Contest," the Board will vote to act on the NOPV at next public Board Meeting. A Decision will be drafted by the Dig Safe Board attorney memorializing the Board's determination. The Board will approve the Decision and it will then be forwarded to the Respondent's jurisdictional regulator.
  4. If the Respondent wishes to contest either the violation, the penalty, or both by providing the Dig Safe Board with a written response to the NOPV, the Board will review the written response, deliberate, and vote to act on the NOPV. A Decision will be drafted by the Dig Safe Board attorney memorializing the Board's determination. The Board will approve the Decision and it will then be forwarded to the Respondent's jurisdictional regulator.
  5. If the Respondent wishes to contest either the violation, the penalty, or both by providing an oral argument during a meeting of the Dig Safe Board, the Board will afford the Respondent an opportunity to orally present their case and evidence on the date proposed in the NOPV or the next public meeting of the Board. At the Meeting, the Board will deliberate and vote to act on the NOPV. A Decision will be drafted by the Dig Safe Board attorney memorializing the Board's determination. The Board will approve the Decision and it will then be forwarded to the Respondent's jurisdictional regulator.
  6. If the Respondent does not wish to present his or her response to the Dig Safe Board, but wishes instead to present before his or her jurisdictional regulator, the Board will vote to act on the NOPV at the next public meeting. A Decision will be drafted by the Dig Safe Board attorney memorializing the Board's determination. The Board will approve the Decision and it will then be forwarded to the Respondent's jurisdictional regulator.
  7. If a respondent is under the Board's jurisdiction and wishes to contest either the violation, the penalty, or both in a hearing before the Office of Administrative Hearings following the hearing, an administrative law judge will present a proposed decision to the Dig Safe Board to approve, deny, or modify at the Board's next public meeting.

## **Board Access to NOPVs**

Within seven (7) days of the NOPVs being mailed to the Respondent, the documents will be placed in an “NOPV” folder on a CAL FIRE server. The Board’s attorney will review the NOPVs to check for conflicts of interest. Once the Board’s attorney completes his review, the members will be granted access to view the NOPVs using their CAL FIRE accounts.

## **Enforcement Action Report**

At each Board meeting in the Executive Officer’s report, the Board will be given an Enforcement Action Report. The report will list all enforcement actions taken by staff since the previous meeting. Staff has developed a preliminary list of information to be provided in the report:

- Number of Advisory Letters mailed
- Number of NOPVs mailed
- List of Violations found
- List of Penalties recommended
- Number of Educational Classes given by staff.
- Number of participants who completed the training
- Fines collected

Staff is requesting Board member assistance in the continued development of the information items they would find of importance and would like included in the Enforcement Action Report.

## **Restriction on Ex Parte Communication**

An ex parte communication is a written or oral communication between a decision maker and an interested person concerning any issue in a formal proceeding, other than procedural matters, that does not occur in a public forum established in the proceeding or on the record of the proceeding. Ex parte communications include communications that are one-way from a decision maker to an interested person. Section 4258 of Title 19 of the California Code of Regulations prohibits ex parte communications on a matter before the Board has acted on it and on any related appeals.

The first group of NOPVs were mailed to respondents on July 8, 2020. Shortly thereafter, I began receiving calls from respondents who wished to discuss the NOPV they had received and the facts of the investigation. This was not unexpected, as my name and phone number are on the NOPVs. I explained to the respondents that I was unable to discuss the facts of the investigation with them and referred them to the response options included with the NOPV if they disagreed with our findings.

If members have questions or need guidance on procedural issues or matters related to a

specific case, they can reach out to Board Counsel, Jeff Brooks.