
California Underground Facilities Safe Excavation Board

April 19, 2018

Agenda Item No. 4 (Action Item) – Staff Report

Resolution No. 18-04-03: Approval of the Adoption of the Regulation to Establish Fees Pursuant to the Dig Safe Act of 2016 and Authorize Rulemaking Proceedings

Presenters

Tony Marino, Executive Officer
Deborah Yang, Legal Counsel

Background

Government Code section 4216.1 requires every operator of a subsurface installation, except the Department of Transportation, to become a member of, participate in, and share in the costs of, a regional notification center. The Board is authorized under Government Code section 4216.16 to obtain funding for its operational expenses from a fee charged to the members of the regional notification centers not to exceed the reasonable regulatory cost incident to enforcement of Government Code section 4216 et seq., and apportion the fee in a manner consistent with formulas used by the regional notification centers. Government Code section 4216.22 provides that the Board may prescribe the rules and regulations as may be necessary or proper to carry out the purposes and intent of the Dig Safe Act of 2016 (SB 661, Chapter 809, Statutes of 2016) (the “Act”) and to exercise the powers and duties conferred upon the Board by the Act.

Discussion

The proposed regulation would establish and specify the amount of the fees, including late fees, the members of the regional notification centers must pay to the Board, as well as payment deadlines and instructions. The objective of the proposed regulation is to ensure that the Board is able to timely repay the loan from the California High-Cost Fund-B Administrative Committee Fund (\$7,406,000 principal and 1.48% interest) and has sufficient funds, which includes a reserve, for its continued operational expenses to carry out the purposes and intent of the Act and to exercise the powers and duties conferred upon the Board by the Act, including 1) coordination of education and outreach activities that encourage safe excavation practices, 2) development of standards for safe excavation, 3) investigations of possible violations of Government Code section 4216 et seq., and 4) enforcement of Government Code section 4216 et seq.

Each time a person contacts a regional notification center to notify it of a proposed excavation, a tracking tool, which is referred to as a “ticket,” is created by the regional notification center. The ticket contains location information about the proposed excavation, which is then compared to digital maps provided by subsurface installation operators showing the regions in which those installations are found, and those operators whose installation regions overlap with the area of proposed excavation are then notified by the regional notification center of the proposed excavation. This notification to the operator is referred to as a “locate request transmission.” In California, an average of roughly eight locate request transmissions are made for each ticket.

Each of the state's two regional notification centers assesses their operational fee somewhat differently, but both are consistent in that the fees are proportionate to the number of locate request transmissions the regional notification centers provide their members. DigAlert assesses a fee on its members for each new locate request transmissions provided to the member—a fee which is to be paid monthly. USA North members pay a percentage of the center's budget in proportion to the locate request transmissions they receive from new, extension, and renewal tickets they receive.¹ DigAlert has a \$10 fixed monthly database fee for its members, and USA North charges a flat annual fee of \$150 that can be applied toward the first 200 locate request transmissions.

Assessing a fee based on locate request transmissions requires consideration of two components: a predictable operational expense² and an unpredictable total number of locate request transmissions. The main driver of the variability of locate request transmissions is the systemic link between tickets and the economy at large. As the economy booms, construction spending rises and excavators call in tickets. In weak economy, the reverse happens. The economy, however, is not the only factor to influence ticket numbers. As the Board, utilities, and contractor associations become more successful in convincing persons who currently do not contact the regional notification centers to do so, tickets—hence locate request transmissions—should increase.³ On the other hand, the number of locate request transmissions per ticket in the state dropped from 10.5 in 2000 to 8.3 in 2017 as members tighten the boundaries of the shapefiles they provide to the regional notification centers to reduce the number of spurious locate request transmissions. The centers—USA North in particular—expects further tightening as members adapt to a change in billing practice (members had been billed by the miles of infrastructure they reported to USA North before the current system of billing by number of locate request transmissions). This is a source of significant uncertainty as 50% of the locate request transmissions sent from DigAlert went to 1.1% of its members, and 50% of the locate request transmissions sent from USA North went to only 1.0% of its members, meaning that a change from only one of the large members could cause a significant drop in overall locate request transmissions (and therefore any fees based on their number).

The Budget Act of 2017 required loan repayment on July 1, 2019. Recognizing that repayment of the loan for two years of operating expenses in addition to collection of operating expenses for the 2019-20 fiscal year would impose a steep fee on regional notification center members to be paid over a short period of time and with little notice, the Department of Finance requested in a Spring Finance Letter for the 2018-19 Budget that the loan be repaid instead on July 1, 2021.⁴ The proposed regulation anticipates legislative approval of this request. Should the Legislature reject or modify the Spring Finance Letter request, a substantial, sufficiently related change will be made to the proposed regulation with fees modified accordingly and appropriate public notice will be given.

A fee to cover the operating expenses of the Board must cover the following cost components: operating expenses, which includes loan repayment (principal and interest), and reasonable reserve. The loan repayment and reasonable reserve should be collected prior to July 1, 2021. This naturally creates two expected fee amounts—one that is to be applied in the period in which the loan is being repaid, and one that is to be applied afterward to support the Board's continuing operational expenses.

In light of the unpredictability of the number of locate request transmissions that will be received by regional notification center members in the years covering the Board's loan repayment, staff chose to use USA North's formula as a model. Each regional notification center member will be assessed a fee in proportion to the member's percentage of the statewide total locate request transmissions in the previous

¹ "Extension" tickets are renewals pursuant to Gov. Code § 4216.2(e), and "renewal" tickets are new tickets pursuant to Gov. Code § 4216.2(i).

² \$3,563,000 unless modified by the Legislature.

³ Unfortunately, the number of excavations that happen without notification are unknown, making quantification of what constitutes success thus far elusive.

⁴ Budget Change Proposal 3540-306-BCP-2018-A1.

calendar year. The locate request transmissions used in the calculation are those which result from each new ticket, renewal ticket, and remark ticket (as identified in Government Code section 4216.2, subdivision (e), section 4216.2, subdivision (i), and section 4216.3, subdivision (b), respectively).

Staff, however, did not choose to implement a minimum bill like that assessed by USA North. A large proportion of regional notification center members receive few or no locate request transmissions a year, and adding a minimum fee would be regressive, disproportionately affect the smaller subsurface installation operators, and potentially serve as a disincentive to smaller subsurface installation operators to come forward and join the regional notification centers. In this light, and to minimize transaction costs, staff chose to exempt a subsurface installation operator from paying a fee if that operator received fewer than 200 locate request transmissions in the previous year. According to data provided by DigAlert and USA North, 783 (or 35.9%) of the 2181 combined members of the regional notification centers received fewer than 200 locate request transmissions for new, renewal, and remark tickets in 2017. But, their fiscal impact is minimal, constituting 0.43% of the total number of billable locate request transmissions. By exempting members with fewer than 200 locate request transmissions from paying a fee to the Board, staff expects to eliminate all financial impact to 35% of the smallest regional notification center members while shifting less than half of a percent of the cost to the other members.

The regional notification centers will apply the fee on bills sent to their members. Using the existing billing system prevents confusing regional notification center members with sending two payments to two different sources. The proposed billing system will allow members to pay using the accustomed payment method. In the event a member fails to pay the required fee, the Board may need to assess a 5% late fee to cover costs to seek and obtain the late payment from the member, which is also consistent with the formula used by DigAlert.

Payment on at least a semi-annual basis allows the regional notification centers to apply the fee on member bills in whatever ways they see fit. This will also limit confusion and minimize process changes for members, as DigAlert and USA North have different billing cycles. Remittance for the prior year of locate request transmissions will be on at least April 1 and October 1 each year to ensure processing by the beginning of the state's fiscal year on July 1. The regional notification centers are required to submit the fees to the Board through the available payment methods that will be indicated on the Board's website.

Recommendation

Staff recommends the Board adopt Resolution No. 18-04-03 approving the adoption of the regulation to establish fees pursuant to the Dig Safe Act of 2016 and authorize rulemaking proceedings.

Attachments: Proposed regulation text
Proposed rulemaking schedule

45 DAY TEXT OF PROPOSED REGULATION (Original)

California Code of Regulations Title 19. Public Safety

Division 4. California Underground Facilities Safe Excavation Board Chapter 1. General

Article 1. General

§ 4001. Purpose and Scope

These regulations establish the California Underground Facilities Safe Excavation Board which coordinates the state's safe excavation education and outreach activities, develops certain safe excavation standards, investigates possible violations of the Dig Safe Act of 2016, and enforces the Dig Safe Act of 2016 through recommendations to jurisdictional state and local agencies or through direct enforcement action. The Dig Safe Act of 2016 authorizes the Board to obtain funding for its operational expenses to carry out its mission from fees charged to members of regional notification centers.

NOTE: Authority cited: Section 4216.22, Government Code. Reference: Sections 4216.6, 4216.12, 4216.16, Government Code; and (Amended by Stats. 2016, Ch. 809 (SB 661), § 1, eff. January 1, 2017).

§ 4010. Fees.

- (a) Each member of a regional notification center who receives more than 200 locate request transmissions in the previous calendar year shall pay a fee to support the operational expenses of the California Underground Facilities Safe Excavation Board as provided in the following formula:

$$Fee = \frac{\text{member locate request transmissions}}{\text{statewide total locate request transmissions}} \times \text{Board budget}$$

In the formula above, "member locate request transmissions" represents the number of locate request transmissions the member of the regional notification center received in the previous calendar year, "statewide total locate request transmissions" is the total number of locate request transmissions issued by the regional notification centers in the previous calendar year, not including those locate request transmissions issued to members who received less than 200 locate request transmissions in the previous calendar year, and "Board budget" is the sum of the expected operational expenses, including any loan repayment, of the California Underground Facilities Safe Excavation Board in the current calendar year.

- (b) (1) Each member of a regional notification center shall remit the fee under

subdivision (a) to the regional notification center as provided in the billing statements issued by the regional notification center on a monthly, quarterly, or semi-annual basis.

(2) The regional notification centers shall submit the fee to the California Underground Facilities Safe Excavation Board at least semi-annually on April 1 and October 1 of each year. Payment method options are available on the California Underground Facilities Safe Excavation Board website: digsafe.fire.ca.gov

(c) If a member fails to pay the fee under subdivision (a) within 45 days of the date of the billing statement as provided in subdivision (b), the Board may issue an invoice to seek and obtain the fee directly from the member and charge the member a late fee of 5% of the amount of the fee, in addition to the fee due in the billing statement.

(d) The California Underground Facilities Safe Excavation Board may reduce the amount or waive payment of the fee under subdivision (a) at any time if the California Underground Facilities Safe Excavation Board determines that there is or will be more than sufficient funds for operational expenses.

(e) For purposes of this section, "locate request transmission" means the notification provided by a regional notification center to an operator to locate and field mark in response to a new or renewed ticket, as identified in Government Code section 4216.2, subdivision (e), to a new ticket created to replace an expired ticket, as identified in Government Code section 4216.2, subdivision (i), or to a ticket requesting a remark, as identified in Government Code section 4216.3, subdivision (b).

NOTE: Authority cited: Section 4216.22, Government Code. Reference: Sections 4216.1, 4216.2, 4216.3, and 4216.16, Government Code.

CALIFORNIA UNDERGROUND FACILITIES SAFE EXCAVATION BOARD
 PROPOSED RULEMAKING SCHEDULE – FEES
 April 19, 2018

Regulatory Process	Deadline
Present regulation to Board for approval	April 19, 2018
Internal review/approval (State Fire Marshal, CAL FIRE, Natural Resources Agency, etc.)	April-May 2018
Submit to Office of Administrative Law (“OAL”) for publication in the CA Regulatory Notice Register	June 5, 2018
Notice is published in the CA Regulatory Notice Register and 45-day public written comment period begins	June 15, 2018
Close of public written comment period. Public hearing held if member of the public requests a public hearing in writing at least 15 days before comment period closes (Gov. Code section 11346.8).	July 30, 2018
Present to Board for approval if there are any public comments or substantive changes to the regulation	August/September 2018
Internal review/approval (State Fire Marshal, etc.)	August/September 2018
Submit to OAL for approval (30 working days to review)	October 16, 2018
OAL approval and Secretary of State filing	November 2018
Effective date of regulations	January 1, 2019

RESOLUTION NO. 18-04-03

**RESOLUTION OF THE CALIFORNIA UNDERGROUND FACILITIES
SAFE EXCAVATION BOARD APPROVING THE ADOPTION OF THE REGULATION
TO ESTABLISH FEES PURSUANT TO THE DIG SAFE ACT OF 2016 AND
AUTHORIZING RULEMAKING PROCEEDINGS**

WHEREAS, pursuant to the Dig Safe Act of 2016 (SB 661, Chapter 809, Statutes of 2016) (the “Act”), codified under Government Code section 4216 et seq. (the “statute”), the California Underground Facilities Safe Excavation Board (the “Board”) is mandated to coordinate education and outreach activities that encourage safe excavation practices, develop certain standards for safe excavation practices, investigate possible violations of the statute, and enforce the statute on specified persons;

WHEREAS, the Board is authorized under the Act to obtain funding for its operational expenses from a fee charged to members of the regional notification centers not to exceed the reasonable regulatory cost incident to enforcement of the statute, and the Board must apportion the fee in a manner consistent with formulas used by the regional notification centers;

WHEREAS, the Board received a loan from the California High-Cost Fund-B Administrative Committee Fund under the Budget Act of 2017 (the “loan”) for the Board’s initial operational expenses to implement the Act, and the Board expects to incur continuous operational expenses;

WHEREAS, the Board must establish the amount of the fee charged to members of the regional notification centers to obtain sufficient funds to timely repay the loan and meet the Board’s continuous operational expenses; and

WHEREAS, Government Code section 4216.22 provides that the Board may prescribe rules and regulations as may be necessary or proper to carry out the purposes and intent of the Act and to exercise the powers and duties conferred upon it by the Act;

THEREFORE, BE IT RESOLVED by the California Underground Facilities Safe Excavation Board as follows:

Section 1. The proposed regulation to establish a fee charged to members of the regional notification centers as authorized under the Act is hereby approved in substantially the form submitted to the Board by staff. The Executive Officer is hereby authorized, for and on behalf of the Board, to proceed as required by the Administrative Procedure Act to adopt the proposed regulation and submit the proposed regulation with the supporting documentation required by law to the Office of Administrative Law.

Section 2. The Executive Officer is hereby authorized, for and on behalf of the Board, to take such actions, including making or causing to be made such changes to the proposed regulation as may be required for approval thereof by the Office of Administrative Law, and to execute and deliver any and all documents, including STD. 399 and STD. 400, that the Executive Officer may deem necessary or advisable in order to effectuate the purposes of this resolution.

Section 3. This resolution shall take effect immediately upon approval.

Date of Adoption: _____