California Underground Facilities Safe Excavation Board

July 24, 2018

Agenda Item No. 2 (Action Item) – Staff Report

Resolution No.18-07-01: Resolution of the California Underground Facilities Safe Excavation Board in Opposition to Assembly Bill 1914 (Flora) Unless Amended

Presenter
Tony Marino, Executive Officer

Recommendation
Staff recommends approval of Resolution No. 18-07-01 to oppose AB 1914 (Flora) unless amended to clarify the California Underground Facilities Safe Excavation Board's rulemaking authority to limit the type of power operated tools and set other conditions on the use of such tools within the tolerance zone of a subsurface installation (see Attachment).

Background
Existing law requires excavators to wait until all subsurface installation operators have marked their lines before beginning work. The law further prohibits the use of power-driven or boring equipment within 24 inches of a utility field mark (the "tolerance zone") until the excavator has determined the exact location of the subsurface installation using hand tools (GOV 4216.4). The law makes an exception for vacuum excavation, allowing the use of vacuum excavation equipment within the tolerance zone to determine its exact location on the condition that the excavator notifies the operator in advance and the operator agrees to the vacuum equipment's use (GOV 4216.4).

The Dig Safe Act of 2016 (Hill, Chapter 809) made several changes to the state's "call before you dig" law, including the creation of the regulatory California Underground Facilities Safe Excavation Board (the "Board") and the elimination of a provision that allowed an excavator to use power tools in the tolerance zone with the permission of the subsurface installation owner. Therefore, many effective soil excavation tools are not allowed in the presence of a subsurface installation, reducing efficiency, and perhaps having unintended consequences to worker safety. Relatedly, the Dig Safe Act of 2016 required the Board to develop a standard as to what constitutes reasonable care in using hand tools around subsurface installations in the tolerance zone (GOV 4216.18).

On June 25, Assembly Member Flora introduced Assembly Bill 1914 ("AB 1914" or the "bill") to amend Government Code section 4216.4(a) to allow excavators to use power-operated or boring equipment in the tolerance zone with the permission from the subsurface installation operator. The bill was amended in the Senate Business, Professions, and Economic Development committee on July 5th to require the Board to determine by July 1, 2020 what tools might be appropriate for use within the tolerance zone and under what condition. Prior to July 1,

2020, however, the amendments allowed use of power-operated or boring equipment with the agreement of the operator. The amendments required the Board to develop guidelines for the use of such tools in the tolerance zone, but they were not clear as to the legal force these guidelines have.

Discussion

Data pertaining to hand tool use in the tolerance zone exists, though the story it tells is not clear. The national nonprofit Common Ground Alliance collects voluntarily-submitted data from subsurface installation operators, locators, and excavators across the country. The nonprofit California Regional Common Ground Alliance takes the California data and publishes it annually on behalf of the state's two regional notification centers, as required by subdivision (g) of GOV 4216.6.

Of the 10,170 damages voluntarily reported in the state in 2016, nearly 500 were attributed to using powered tools in the tolerance zone prior to uncovering the buried facility with hand tools, a similar proportion to the causes of failure to locate a facility properly, but significantly less than the number of damages caused by failure to contact 811 prior to excavating.

It is clear in 2016 damage data for California, however, that using hand tools does not guarantee safe excavation as one-third of the state's reported damages were from the use of hand tools. The data may include reports of damages from pneumatic or other powered "hand tools," as the reporting form leaves the definition of "hand tool" to the reporter.

Before the Dig Safe Act of 2016 (Hill, Chapter 809), excavators could use power-driven equipment within the tolerance zone before locating the subsurface installation with the consent of the subsurface infrastructure owner. The changes proposed by the bill would once again allow power-driven equipment in the tolerance zone before locating the subsurface installation under the following timeframes:

Until July 1, 2020: AB 1914 would allow the use of hand-held pneumatic or hand-held motorized power-operated equipment if agreed upon by the excavator and operator. The Board would be required to adopt guidelines on the use of hand-held pneumatic or hand-held motorized power-operated equipment.

Beginning July 1, 2020: AB 1914 would allow an excavator to use power-operated or boring equipment before determining the exact location of subsurface installations. The Board would be required to determine the type of power-operated or boring equipment that may be used within the tolerance zone, through the adoption of regulations on or before July 1, 2020.

Power-driven equipment is desired by some for excavation because of a mechanical advantage over hand tools. While the power of this equipment increases productivity, this same power may also increase the severity of injuries to excavators and damage to utilities.

Given the lack of clear understanding about how human-and machine-powered hand tools may be used safely (or unsafely) in the immediate vicinity of subsurface installations, and given that the Board is pursuing the development of related standards, the Board may wish to develop regulations to make a determination of when it might be appropriate to used power-driven excavation or boring equipment in the tolerance zone.

Staff's recommended changes to the bill (attached) affect the process for power-operated tool use prior to July 1, 2020. Staff's proposed amendments will give the Board discretion to determine the type of hand-held pneumatic or hand-held motorized power-operated equipment and the maximum force that may be used by equipment and attachments used in the tolerance zone, prior to exposing the subsurface installation. These recommended changes will also allow the Board to determine the soil type(s) on which equipment may or may not be used within the tolerance zone prior to exposing the subsurface installation. Staff expects that the Board will want to be very narrow in the type of power-operated tool, its power setting, and the circumstances in which it will be used when the Board develops these pre-July 2020 rules.

Further, the bill does not expressly exempt the "guidelines," which the Board is required to adopt on the use of hand-held pneumatic or hand-held motorized power-operated equipment, from the Administrative Procedure Act. Government Code section 11346 provides that the Administrative Procedure Act is applicable to the exercise of any quasi-legislative power conferred by any statute and shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly. Guidelines (or rules, regulations, etc.) that require excavators to use certain tools in certain conditions are not enforceable unless adopted in accordance with the Administrative Procedure Act or statutorily expressly exempted from the Act. In order for the Board to adopt in a timely manner enforceable guidelines to allow excavators to use certain hand-held pneumatic or hand-held motorized power-operated equipment within the tolerance zone until July 1, 2020, the bill must be amended to expressly exempt the guidelines or rules from the Administrative Procedure Act.

Attachments: *Assembly Bill 1914 (Flora), as amended in the Senate on July 5, 2018*
Staff recommended amendment to Assembly Bill 1914 (Flora)
Resolution No. 18-07-01

AMENDED IN SENATE JULY 5, 2018

AMENDED IN SENATE JUNE 25, 2018

AMENDED IN SENATE JUNE 14, 2018

AMENDED IN ASSEMBLY APRIL 2, 2018

CALIFORNIA LEGISLATURE—2017–18 REGULAR SESSION

ASSEMBLY BILL No. 1914

Introduced by Assembly Member Flora

January 23, 2018

An act to amend Section 4216.4 of the Government Code, relating to state government.

LEGISLATIVE COUNSEL'S DIGEST

AB 1914, as amended, Flora. Underground installations: excavations.

Existing law requires any person who plans to conduct any excavation to contact the appropriate regional notification center before commencing that excavation, as specified. Existing law requires an operator of a subsurface installation who receives notification of proposed excavation work, within 2 working days of that notification excluding weekends and holidays, to mark the approximate location and number of subsurface installations that may be affected by the excavation or to advise that no subsurface installations operated by him or her would be affected.

This bill would ~~authorize an excavator and the operator of affected subsurface facilities to agree to~~ *require the California Underground Facilities Safe Excavation Board, by July 1, 2020, to adopt regulations to* allow the excavation to be done with certain equipment prior to determining the exact location of the facilities affected by the

excavation. *The bill would also require the board to adopt and post on its Internet Web site guidelines that would be in effect until the regulations are adopted to permit an excavator and the operator of subsurface installations to agree to the use of specified hand-held equipment to excavate prior to determining the exact location of the facilities affected by the excavation.*

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ *yes*. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 4216.4 of the Government Code is amended to read:

4216.4. (a) (1) Except as provided in paragraph (2), if an excavation is within the tolerance zone of a subsurface installation, the excavator shall determine the exact location of the subsurface installations in conflict with the excavation using hand tools before using any power-driven excavation or boring equipment within the tolerance zone of the subsurface installations. In all cases the excavator shall use reasonable care to prevent damaging subsurface installations.

(2) (A) An excavator may use a vacuum excavation device to expose subsurface installations within the tolerance zone if the operator has marked the subsurface installation, the excavator has contacted any operator whose subsurface installations may be in conflict with the excavation, and the operator has agreed to the use of a vacuum excavation device. An excavator shall inform the regional notification center of his or her intent to use a vacuum excavation device when obtaining a ticket.

(B) An excavator may use power-operated or boring equipment for the removal of any existing pavement only if there is no known subsurface installation contained in the pavement.

~~(C) An excavator may use power-operated or boring equipment prior to determining the exact location of subsurface facilities if agreed upon by the excavator and the operator with facilities in conflict with the excavation.~~

(C) Beginning July 1, 2020, an excavator may use power-operated or boring equipment, as determined by the board, prior to determining the exact location of subsurface installations.

The board shall adopt regulations to implement this paragraph on or before July 1, 2020.

(D) Until July 1, 2020, or the adoption of regulations pursuant to subparagraph (C), an excavator may operate hand-held pneumatic or hand-held motorized power-operated equipment if agreed upon by the excavator and the operator with subsurface installations. The board shall adopt guidelines on the use of hand-held pneumatic or hand-held motorized power-operated equipment and these guidelines shall be posted on the board's Internet Web site.

(3) An excavator shall presume all subsurface installations to be active, and shall use the same care around subsurface installations that may be inactive as the excavator would use around active subsurface installations.

(b) If the exact location of the subsurface installation cannot be determined by hand excavating in accordance with subdivision (a), the excavator shall request the operator to provide additional information to the excavator, to the extent that information is available to the operator, to enable the excavator to determine the exact location of the installation. If the excavator has questions about the markings that an operator has placed, the excavator may contact the notification center to send a request to have the operator contact the excavator directly. The regional notification center shall provide the excavator with the contact telephone number of the subsurface installation operator.

(c) (1) An excavator discovering or causing damage to a subsurface installation, including all breaks, leaks, nicks, dents, gouges, grooves, or other damage to subsurface installation lines, conduits, coatings, or cathodic protection, shall immediately notify the subsurface installation operator. The excavator may contact the regional notification center to obtain the contact information of the subsurface installation operator. If the operator is unknown and the damage or discovery of damage occurs outside the working hours of the regional notification center, the excavator may follow the instructions provided by the regional notification center through its Internet Web site or the telephone line recorded message.

(2) An excavator shall call 911 emergency services upon discovering or causing damage to either of the following:

(A) A natural gas or hazardous liquid pipeline subsurface installation in which the damage results in the escape of any flammable, toxic, or corrosive gas or liquid.

(B) A high priority subsurface installation of any kind.

(d) Each excavator, operator, or locator shall communicate with each other and respect the appropriate safety requirements and ongoing activities of the other parties, if known, at an excavation site.

California Underground Facilities Safe Excavation Board

Staff Recommended Amendment to AB 1914 (Flora)
Government Code section 4216.4, subdivision (a)

(a) (1) Except as provided in paragraph (2), if an excavation is within the tolerance zone of a subsurface installation, the excavator shall determine the exact location of the subsurface installations in conflict with the excavation using hand tools before using any power-driven excavation or boring equipment within the tolerance zone of the subsurface installations. In all cases the excavator shall use reasonable care to prevent damaging subsurface installations.

(2) (A) An excavator may use a vacuum excavation device to expose subsurface installations within the tolerance zone if the operator has marked the subsurface installation, the excavator has contacted any operator whose subsurface installations may be in conflict with the excavation, and the operator has agreed to the use of a vacuum excavation device. An excavator shall inform the regional notification center of his or her intent to use a vacuum excavation device when obtaining a ticket.

(B) An excavator may use power-operated or boring equipment for the removal of any existing pavement only if there is no known subsurface installation contained in the pavement.

(C) Beginning July 1, 2020, an excavator may use power-operated or boring equipment, as determined by the Board, prior to determining the exact location of subsurface installations. The Board shall adopt regulations to implement this paragraph on or before July 1, 2020.

~~***(D) Until July 1, 2020 or the adoption of regulations pursuant to (C), an excavator may operate hand-held pneumatic or hand-held motorized power-operated equipment if agreed upon by the excavator and the operator with subsurface installations. The board shall adopt guidelines on the use of hand-held pneumatic or hand-held motorized power-operated equipment and these guidelines shall be posted on the board's Internet Web site website.***~~

(D) Until July 1, 2020, the Board may adopt rules to allow an excavator to operate hand-held pneumatic or hand-held motorized power-operated equipment within the tolerance zone if agreed upon by the excavator and the operator of the subsurface installation. The Board shall post on its website any rules that the Board may adopt on the use of hand-held pneumatic or hand-held motorized power-operated equipment within the tolerance zone. Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to rules adopted by the Board pursuant to this paragraph.

(3) An excavator shall presume all subsurface installations to be active, and shall use the same care around subsurface installations that may be inactive as the excavator would use around active subsurface installations.

RESOLUTION NO. 18-07-01

RESOLUTION OF
THE CALIFORNIA UNDERGROUND FACILITIES SAFE EXCAVATION BOARD
IN OPPOSITION TO ASSEMBLY BILL 1914 (FLORA) UNLESS AMENDED

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, Government Code section 4216.4, subdivision (a), requires excavators to determine the exact location of subsurface installations in conflict with the excavation by using hand tools before using any power-driven excavation or boring equipment within the tolerance zone of the subsurface installation, except the use of a vacuum excavation device with agreement by the operator and to remove any existing pavement where there is no known subsurface installation in the pavement;

WHEREAS, Assembly Bill 1914, introduced by Assembly Member Flora, (the "bill") would require the Board to adopt regulations to allow excavators to use certain power-operated or boring equipment prior to determining the exact location of subsurface installations beginning July 1, 2020;

WHEREAS, the bill further requires the Board to adopt guidelines on the use of hand-held pneumatic or hand-held motorized power-operated equipment when agreed upon by the excavator and operator, and such guidelines would be in effect until July 1, 2020;

WHEREAS, Government Code section 11346 provides that the Administrative Procedure Act is applicable to the exercise of any quasi-legislative power conferred by any statute and shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly; and

WHEREAS, in order to establish safe excavation practices, the Board must be given discretion to limit the type of hand-held pneumatic or hand-held motorized power-operated equipment and establish other conditions on the use of such equipment within the tolerance zone of a subsurface installation;

THEREFORE, BE IT RESOLVED that the California Underground Facilities Safe Excavation Board opposes Assembly Bill 1914 (Flora) unless amended to clarify the Board's rulemaking authority by (1) expressly exempting rules the Board may adopt from the Administrative Procedure Act, and (2) providing the Board with discretion to limit the type of hand-held pneumatic or hand-held motorized power-operated equipment and establish other conditions on the use of such equipment within the tolerance zone of a subsurface installation. Further, the Executive Officer, in consultation with Board Members Bianchini and Johnson, is delegated the authority to modify and convey the Board's position on the bill to the Legislature upon any subsequent bill amendments.

Date of Adoption: _____