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

November 8, 2018

Agenda Item No. 3 (Action Item) – Staff Report

Resolution No. 18-11-01: Authorize the Executive Director to execute a memorandum of understanding with the Registrar of the Contractors State License Board

Presenters
Tony Marino, Executive Director
Deborah Yang, Legal Counsel

Recommendation
Staff recommends the Board adopt Resolution No. 18-11-01 authorizing the Executive Director to execute a memorandum of understanding with the Registrar of the Contractors State License Board ("CSLB").

Background
The Dig Safe Board was established under the Dig Safe Act of 2016 (the "Act") to coordinate education and outreach activities that encourage safe excavation practices, develop standards, investigate possible violations, enforce Government Code section 4216 et seq. on specified persons, and make enforcement recommendations to CSLB, the California Public Utilities Commission, and the Office of the State Fire Marshal.

Under the Act, the Dig Safe Board is authorized to make recommendations to CSLB to take enforcement actions related to incidents involving subsurface installations on contractors, as defined in Article 2 (commencing with Section 7025) of Chapter 9 of Division 3 of the Business and Professions Code, and telephone corporations, as defined in Section 234 of the Public Utilities Code, when acting as a contractor, as defined in Article 2 (commencing with Section 7025) of Chapter 9 of Division 3 of the Business and Professions Code.

CSLB is required by the Act to act to accept, amend, or reject the Dig Safe Board's enforcement recommendation.

Discussion
After several months of discussions, staff and CSLB drafted a memorandum of understanding ("MOU") to outline each state agency's responsibilities and set forth the parties' commitment to collaborate to increase public safety through information sharing guidelines that support investigation and enforcement processes and maximize resources. Under the MOU, the parties may coordinate investigation activities to optimize resources and ensure that violations are pursued by the appropriate state agency, and will provide information about enforcement actions under the Act for purpose of reporting to the Federal Pipeline and Hazardous Materials Safety

Administration ("PHMSA"), State Legislature, Governor, or other regulatory purposes. The MOU also provides that the parties may share confidential information regarding their respective investigatory procedures and investigations of probable violations, which may include information supplied by or on behalf of an operator or excavator, or other evidence gathered at the incident site or related to the incident such as photographs and witness statements. The parties will not release or disclose such confidential information without written consent, unless required by law or court order.

Staff believes the MOU with CSLB will further the Board's purposes under the Act. Information sharing practices and cooperation among the state agencies with investigations and enforcement actions will increase the Board's resources to effectively carry out its responsibilities.

Attachments: Resolution No. 18-11-01
Memorandum of Understanding

RESOLUTION NO. 18-11-01

RESOLUTION OF
THE CALIFORNIA UNDERGROUND FACILITIES SAFE EXCAVATION BOARD RELATING TO THE APPROVAL OF MEMORANDUM OF UNDERSTANDING WITH THE REGISTRAR OF THE CONTRACTORS STATE LICENSE BOARD AND AUTHORIZING THE EXECUTIVE OFFICER TO EXECUTE THE MEMORANDUM OF UNDERSTANDING

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 "Dig Safe 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 Dig Safe Board is authorized under the Act to make recommendations to the Registrar of the Contractors State License Board to take enforcement actions related to incidents involving subsurface installations on contractors, as defined in Article 2 (commencing with Section 7025) of Chapter 9 of Division 3 of the Business and Professions Code, and telephone corporations, as defined in Section 234 of the Public Utilities Code, when acting as a contractor, as defined in Article 2 (commencing with Section 7025) of Chapter 9 of Division 3 of the Business and Professions Code; and

WHEREAS, collaboration with the Registrar of the Contractors State License Board will further the Dig Safe Board's responsibilities under the Act and help increase public safety through information sharing guidelines that support investigation and enforcement processes and maximize resources;

THEREFORE, BE IT RESOLVED that the Executive Officer is hereby authorized to execute a memorandum of understanding with the Registrar of the Contractors State License Board to outline each state agency's responsibilities and set forth the parties' commitment to collaborate to increase public safety through information sharing guidelines that support investigation and enforcement processes and maximize resources.

Date of Adoption: _____

MEMORANDUM OF UNDERSTANDING BETWEEN
THE CALIFORNIA UNDERGROUND FACILITIES SAFE EXCAVATION BOARD
AND THE REGISTRAR OF THE CONTRACTORS STATE LICENSE BOARD

This Memorandum of Understanding ("MOU") is made and entered into as of _____, 2018 by the California Underground Facilities Safe Excavation Board (the "Dig Safe Board") and the Registrar of the Contractors State License Board (the "Registrar"); each a "party" and collectively, the "parties".

1. Purpose

The purpose of this MOU is to describe generally the roles and responsibilities of each party under Senate Bill 661 (Hill), known as the Dig Safe Act of 2016 (commencing at Government Code section 4216 and following -- the "Act"). This MOU sets forth the parties' commitment to collaborate to increase public safety. This MOU contains information sharing guidelines to support investigation and enforcement processes and maximize parties' respective resources.

2. Roles and Responsibilities under the Dig Safe Act of 2016

The Dig Safe Board was established under the Act to coordinate education and outreach activities that encourage safe excavation practices, develop standards, investigate possible violations, enforce Government Code section 4216 et seq. on specified persons, and make enforcement recommendations to the California Public Utilities Commission, the Office of the State Fire Marshal, and the Registrar. Further, the Dig Safe 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.

Following an enforcement recommendation of the Dig Safe Board, the Registrar is authorized under the Act to enforce Government Code section 4216 et seq. on contractors, as defined in Article 2 (commencing with Section 7025) of Chapter 9 of Division 3 of the Business and Professions Code, and telephone corporations, as defined in Section 234 of the Public Utilities Code, when acting as a contractor, as defined in Article 2 (commencing with Section 7025) of Chapter 9 of Division 3 of the Business and Professions Code. The Registrar is required by the Act to act to accept, amend, or reject the Dig Safe Board's enforcement recommendation.

3. Investigation and Enforcement Processes

a. The parties agree that they have common interests with respect to their respective investigations of contractors' compliance with the Act. The parties have distinct duties to investigate incidents related to subsurface installations. The parties have agreed to assist each other in their respective investigations and believe that the sharing of confidential and privileged information among their management, employees, legal counsel, agents or experts will further their common enforcement goals. The parties will cooperate, coordinate and assist each other with their respective investigations to the extent possible, which may include making relevant staff available for the other party's enforcement proceedings.

b. The parties will share relevant information about possible violations of the Act discovered during investigations as soon as practical.

c. The parties may coordinate investigation activities to optimize resources and ensure that violations are pursued by the appropriate agency.

d. The Registrar will act to accept, amend, or reject a recommendation of the Dig Safe Board for an enforcement action under the Act as soon as practical, and share information with the Dig Safe Board about its ultimate actions.

e. The Dig Safe Board and the Registrar, or their respective designated staff, will each promptly provide information about its enforcement actions under the Act when requested by the other party for reporting to the Federal Pipeline and Hazardous Materials Safety Administration, or the State Legislature or Governor, or other regulatory purposes.

4. Information Sharing Guidelines

a. The parties may share confidential information regarding their respective investigatory procedures and investigations of a possible violation under the Act, which may include information supplied by or on behalf of an operator or excavator, or other evidence gathered at the incident site or related to the incident such as photographs and witness statements. For purposes of this MOU, confidential information includes privileged documents or privileged communications which are subject to one or more privileges including the official information privilege (Evidence Code section 1040), the attorney-client privilege, the attorney work product doctrine or any other right to withhold a document from public disclosure as authorized by state or federal law.

b. Confidential information may be shared as described in this MOU and as allowed by law, without waiver of confidentiality or any privilege. Documents containing confidential information should be labeled as confidential or include a similar written advisory to that effect.

c. Government Code section 6254.5(e) provides that disclosures made by any governmental agency to a governmental agency that agrees to treat the disclosed material as confidential will not constitute a waiver of any relevant exemption of the California Public Records Act. Pursuant to Government Code section 6254.5(e), the parties agree that the investigative records exchanged by the parties will be used only to enforce the Act.

d. As provided in Government Code section 6254.5(e), confidential records will only be shared with the following authorized persons: (1) the parties' officers, including the Dig Safe Board's Executive Officer, the Dig Safe Board members, the Registrar and any deputies; (2) the parties' legal counsels; (3) the parties' staff; and, (4) the parties' agents, experts or consultants, who are reasonably necessary to the conduct of the parties' investigations and enforcement of any action under their respective jurisdictions. Each party shall take all reasonable and appropriate measures to ensure that any person granted access to any confidential or privileged information shared pursuant to this MOU is familiar with the MOU and complies with its terms as they relate to the duties of such person.

e. The parties will make all reasonable efforts to ensure that disclosure of confidential information will not occur. In the event an inadvertent disclosure of confidential or

privileged information occurs, the party making such inadvertent disclosure will promptly notify the other party in writing and will make every reasonable effort to address the inadvertent disclosure, including asserting any appropriate objections.

f. Documents marked or designated as confidential shall not be made public by the recipient party without an agreement in writing from the party that provided the confidential information, unless required by law or by order of a court of competent jurisdiction.

g. If either party receives a request to release, disclose, or access any confidential information provided to it by the other party (for example, pursuant to a subpoena, discovery request, the Information Practices Act or the California Public Records Act), the party receiving the request shall promptly transmit a copy of the request to the party that originally generated the confidential or privileged document or communication. The parties further agree that the party receiving the request, subpoena, discovery request, or other legal process will withhold the confidential records exempt under the California Public Records Act, assert any objection, or file any motion, as applicable and appropriate.

5. Validity, Term, and Amendment

a. This MOU may be executed in any number of counterparts, each of which when so executed and delivered shall be an original; but, all counterparts shall together constitute one and the same instrument.

b. Any provision of this MOU that is determined to be invalid or unenforceable shall be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining provisions of this MOU.

c. This MOU shall remain in full force and effect unless amended or replaced upon written agreement by the parties or terminated by either party. Any party may terminate this MOU by notifying the other party in writing of their intention to terminate the MOU by a specified date.

Each party represents and warrants that it has the right, power, and authority to execute this MOU. Each party represents and warrants that it has given any and all notices, and obtained any and all consents, powers, and authorities necessary to permit that party, and the persons executing this MOU on behalf of the party, to enter into this MOU.

IN WITNESS WHEREOF, the parties to this MOU have caused this MOU to be executed and delivered as of _____, 2018.

Tony Marino Executive Officer CALIFORNIA UNDERGROUND FACILITIES SAFE EXCAVATION BOARD	David R. Fogt Registrar of Contractors CONTRACTORS STATE LICENSE BOARD