

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: February 15, 2012

To: The Commission
(Meeting of February 16, 2012)

From: Office of Governmental Affairs (OGA) – Sacramento

Subject: **AB 1514 (Lowenthal) – Public works: excavations: violations**
As introduced: January 13, 2012

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: SUPPORT AS SPONSOR

SUMMARY OF BILL:

AB 1514 would authorize the California Public Utilities Commission (CPUC) to enforce and issue civil penalties for an operator's or an excavator's failure to comply with Government Code 4216 (California's "One-Call Law"). Currently, only the Attorney General, District Attorneys, or local permitting agencies can enforce the law. This bill would add the CPUC to the list of agencies authorized to enforce GC 4216.6.

The Commission was urged to pursue legislation to secure enforcement authority over one-call violations as one of three legislative recommendations made in the Independent Review Panel's report on the San Bruno explosion.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

Government Code 4216 requires any person planning to conduct an excavation to contact a regional notification center prior to excavation in order to reduce the potential for damages and injuries during excavation activities. However, in any given year, violations of GC 4216 result in thousands of instances in which subsurface utility facilities are struck and damaged. For CPUC jurisdictional natural gas utility facilities alone, available data indicates that in an average year, approximately 1,500 hits result in over \$1.6 million in damages.

Currently, only the California Attorney General, district attorneys, or local permitting agencies can take action to enforce the civil penalties codified in GC 4216, Section 4216.6(a)(1). However, these agencies do not prosecute violations of GC 4216 due to their need to allocate resources toward prosecuting cases involving what are believed to be more serious violations of law. In many states, including all of California's neighboring states, the states' public utilities commission enforces the states' one-call laws. In most cases, the states' public utilities commission directly enforces these laws,

but indirect enforcement is done in Virginia and Vermont where the states' public utilities commission makes recommendations to an independent panel which accepts those commissions' recommendations nearly 100% of the time. In Pennsylvania, the Occupational Safety and Health Administration (OSHA) enforces the one-call laws, but that model has proven unsuccessful and legislation is currently pending that would shift enforcement authority to the state's public utilities commission. In all instances, the states have adopted a graduated penalty process which emphasizes education of first time offenders, but is aggressive with repeat offenders who refuse to comply with the law.

The federal government, through the US Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) provides clear direction regarding what it expects in states' programs to prevent damage to subsurface facilities. A key element, Element 7 of the PHMSA guidance, is the need for states to have a strong enforcement program that includes education and monetary penalties as incentives to comply with the law. PHMSA has urged the CPUC to seek enforcement authority for GC 4216 (California's "One-Call Law").

Almost 75% of yearly hits occur due to inadequate excavation practices, which can include failure to call the one-call center, failure to maintain the facility markings, using power operated tools too close to the facility, etc. Utilities are not immune from violating GC 4216 and sometimes hit their own facilities or fail to properly communicate the location of their facilities to excavators. However, most frequently, utility facilities are damaged by parties not working for the utilities. Complete data is not available for utilities other than natural gas because no agency requires such data to be reported.

There is an immediate threat to the public when subsurface facilities are damaged due to inadequate excavation practices. Flammable gases, pressurized sewage, hazardous liquids, and electric cables create an immediate safety hazard, while damaged communication facilities can significantly impact 911 services and public commerce.

There is also a significant concern when facilities are damaged, but not fully breached to the point that the commodity transported is released. In such instances, excavators have been known to cover up the damaged facility only to have it fail, unpredictably, at a later time due to the stress or increased corrosion potential created by the damage. When that occurs and no notice to the one-call center was provided, the owner of the facility has no way of easily becoming aware of the potential problem. Therefore, there is a threat to all citizens, from all inadequate excavation practices, whether they are related to activities occurring on facilities jurisdictional to the CPUC, or not.

The CPUC is well-positioned to enforce GC 4216 because it already has the technical expertise and resources available. The CPUC also has the support of the federal government's Pipeline and Hazardous Materials Safety Administration and CPUC staff has closely reviewed lessons learned by enforcement agencies from other states that have mature one-call enforcement programs. In addition, the CPUC's Consumer Protection and Safety Division (CPSD) also has experience coordinating other types of

enforcement action with the Attorney General's Office (AG) and local district attorneys statewide.

Although the bill adds the CPUC to the list of agencies authorized to enforce the provisions of GC 4216, the CPUC would share enforcement authority with entities already included in GC 4216, most prominently the AG.

SUMMARY OF SUGGESTED AMENDMENTS:

None.

DIVISION ANALYSIS (Consumer Protection and Safety Division & Legal Division):

Currently, the CPUC's Gas Safety and Reliability Branch (GSRB) investigates incidents involving natural gas utilities that are struck and damaged through violations of GC 4216. Since GSRB has the most experience with the one-call law and the elements required to be included in an effective damage prevention enforcement program, it would be largely tasked to implement the CPUC's one-call enforcement program.

GSRB believes the enforcement program will initially find many violations requiring the allocation of significant resources towards the enforcement program. However, as has been the experience of California's neighboring states with their respective one-call enforcement programs, the number of violations is expected to decrease as awareness of the enforcement program and monetary penalties, creates the desired change in excavator attitudes regarding compliance with the one-call law. Therefore, over time, GSRB expects that work related to potential violations of GC 4216 will supplant its current investigations of incidents after they have been struck through inadequate excavation practices.

OTHER STATES' OR FEDERAL INFORMATION:

All of California's bordering states have very effective, mature, enforcement programs for their respective one-call laws. In all instances, the state utility commissions have enforcement authority over the one-call laws and this authority extends to all subsurface facilities throughout their states. This includes all jurisdictional and non-jurisdictional facilities, as well as municipal facilities. As excavators, cities, and any contractors working for cities, are not exempted from one-call requirements.

PHMSA has emphasized the need for states "to adopt legislation enacting civil enforcement authority to prosecute violators of damage prevention laws." (See PHMSA's 2007 – 2011 Strategic Plan dated August 8, 2007, pages 17-18.) Damage from excavations is the leading cause of pipeline-related fatalities. Recently, through the 2006 Pipes Act, PHMSA has indicated that it has the authority at the federal level to enforce one-call requirements in states that do not take action on their own to enforce state one-call laws. It's undefined how, or when, PHMSA would take the step to invoke

its authority, or how far the authority could extend; however, this is something of which the CPUC and the excavation community in California need to be aware.

PROGRAM BACKGROUND:

The CPUC's natural gas safety program is funded by a combination of user fees on natural gas utility bills and annual grant support from the federal Department of Transportation through the state certification agreement. The bill would require the CPUC to establish an enforcement program to levy civil penalties against an operator or excavator who violates the provisions of GC 4216.6. In light of the significant number of additional staff added to the gas safety program in FY 2011-2012 and if the additional natural gas enforcement staff proposed in the Governor's budget is approved, the CPUC expects that it can carry out the enforcement program primarily with existing or soon-to-be –acquired resources. Moreover, this bill would provide California with an effective one-call enforcement program which would increase the CPUC's eligibility for additional federal funds from the One-Call and Damage Prevention Grants that could be used towards enforcement efforts.

LEGISLATIVE HISTORY:

None.

FISCAL IMPACT:

None.

STATUS:

AB 1514 is pending hearing in the Assembly Utilities and Commerce Committee.

SUPPORT/OPPOSITION:

None on file.

STAFF CONTACTS:

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Date: February 15, 2012

BILL LANGUAGE:

BILL NUMBER: AB 1514 INTRODUCED
BILL TEXT

INTRODUCED BY Assembly Members Bonnie Lowenthal and Dickinson

JANUARY 13, 2012

An act to amend Section 4216.6 of the Government Code, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

AB 1514, as introduced, Bonnie Lowenthal. Public works: excavations: violations.

Existing law generally requires any person planning to conduct an excavation to contact a regional notification center prior to excavation, and, if practical, to delineate the areas to be excavated. Existing law authorizes the Attorney General, a district attorney, or the state or a local agency that issued a permit to excavate to bring an action for the enforcement of a civil penalty against an operator or excavator who negligently or knowingly and willfully violates these and related provisions.

This bill would also authorize the Public Utilities Commission to bring an action for enforcement pursuant to the provisions described above.

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

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 4216.6 of the Government Code is amended to read:

4216.6. (a) (1) Any operator or excavator who negligently violates this article is subject to a civil penalty in an amount not to exceed ten thousand dollars (\$10,000).

(2) Any operator or excavator who knowingly and willfully violates any of the provisions of this article is subject to a civil penalty in an amount not to exceed fifty thousand dollars (\$50,000).

(3) Except as otherwise specifically provided in this article, this section is not intended to affect any civil remedies otherwise provided by law for personal injury or for property damage, including any damage to subsurface installations, nor is this section intended to create any new civil remedies for those injuries or that damage.

(4) This article shall not be construed to limit any other provision of law granting governmental immunity to state or local agencies or to impose any liability or duty of care not otherwise imposed by law upon any state or local agency.

(b) An action may be brought by the Attorney General, the district attorney, *the Public Utilities Commission*, or the local

or state agency which issued the permit to excavate, for the enforcement of the civil penalty pursuant to this section. If penalties are collected as a result of a civil suit brought by a state or local agency for collection of those civil penalties, the penalties imposed shall be paid to the general fund of the agency. If more than one agency is involved in enforcement, the penalties imposed shall be apportioned among them by the court in a manner that will fairly offset the relative costs incurred by the state or local agencies, or both, in collecting these fees.