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## California Underground Facilities Safe Excavation Board

July 8-9, 2024

Agenda Item No. 11 (Action Item) – Staff Report

*Recommendation to the Governor and Legislature Regarding the Emergency Exemption to 811 Notification*

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### **PRESENTER**

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### **SUMMARY**

At its April meeting, the Board discussed the problems associated with the emergency excavation notification exemption and came to a consensus that excavators should always provide 811 notification, including in emergency situations. This report recaps the discussion items from April and raises new issues for the Board to discuss regarding delineation during emergencies and excavation within 10 feet of high priority lines during emergencies. Staff recommends that the Board approve a recommendation, detailed below, to the Governor and Legislature and include that recommendation in the 2024 Annual Report.

### **STRATEGIC PLAN**

2020 Strategic Plan Direction: Improve Accessibility of Buried Infrastructure Location Knowledge and Understanding.

### **BACKGROUND**

With limited exceptions, the Dig Safe Act requires a person performing excavation to notify the 811-notification center prior to commencing excavation. One of those exceptions is an emergency.<sup>1</sup> Emergencies are broadly defined as “a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.”<sup>2</sup>

In an emergency, an excavator need not make any 811 notification, or if they have made a

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<sup>1</sup> [Gov. Code § 4216.2](#) (b).

<sup>2</sup> [§ 4216](#) (e).

notification, they need not wait until all operators have responded to an excavation notification prior to beginning work. If an excavator doesn't notify the 811 notification center, the operator does not perform a locate and mark or provide maps or other information.

The 811 notification centers have created an "emergency" ticket type to allow an excavator to alert operators in the vicinity that an excavation is taking place, even if the excavator does not need to wait for all operators to respond. The 811 notification centers process emergency tickets as new tickets with a priority of "emergency". As such, these tickets have the same information as a new ticket, including a legal start date and time. As a notice of pending excavation, these "emergency" notification tickets create the same obligation for operators to respond and provide an electronic positive response as do other new tickets.

Several Board investigations, including those initiated by complaints, have involved the emergency exemption. Board members have discussed the exemption during enforcement actions and in non-violation safety issues agenda items. The Dig Safe Act requires Board recommendations to the Governor and Legislature be included in its annual report.<sup>3</sup>

During its April 2024 meeting, the Board considered under what conditions an excavator should make an 811 notification even if it is an emergency, and how an operator should respond to these notifications. The Board concluded that excavators should be required to make 811 notifications in all emergencies, that the excavator should not need to wait for operators to respond to begin addressing the emergency, and that operators should continue to be required to respond to all emergency tickets under the existing two-day timeframe. The Board directed staff to develop for review and discussion a draft recommendation to the Governor and Legislature for amending the statute to eliminate the 811-notification exemption for emergency excavations.

## **DISCUSSION**

As the emergency exemption application is broad, modifying the exemption has ramifications for other excavator and operator responsibilities in the statute, each of which needs to be considered as a separate issue and resolved. The following issues have been divided into two categories: those that were discussed at the April Board Meeting and where the Board has expressed an opinion, and those that staff has identified after the meeting, and that the Board should discuss. The issues identified after the April meeting primarily deal with high-priority subsurface installation provisions.

### **Issues Discussed During the April Board Meeting**

*The following issues were discussed at the April Board Meeting.*

***Issue 1:*** *Should the definition of emergency be modified? (Government Code § 4216.2 (f))*

Proposal: No. Do not modify the definition of an emergency.

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<sup>3</sup> [§ 4216.23](#) (b).

Rationale:

- The current definition is broad enough to encompass the likely scenarios where one would need to excavate without waiting two days in order to prevent or mitigate loss or damage to life, health, property, or essential public services.
- Modifications to limit the exemption could lead to a value determination that the loss of life, health, property, or essential services for some residents and businesses of California is more acceptable than the loss for others.
- While there are concerns about the “misuse” of an emergency exemption, this should be addressed through enforcement rather than changing the current law.

***Issue 2:*** *Should excavators be required to notify 811 for an emergency excavation? (Government Code § 4216.2 (b))*

Proposal: Yes. Excavators should be required to notify 811 immediately upon discovering the need for an emergency excavation. They should also notify 811 that they will be digging immediately as a result of an emergency.

Rationale:

- 811 notification provides two benefits:
  1. Allowing the excavator to know what operators have subsurface installations in the area, and
  2. Providing operators an opportunity to inform excavators of the location of their subsurface installations and alert them to high priority installations.
- Even if an operator cannot engage with an excavator prior to the start of an emergency excavation, the excavator would benefit from knowing the identity of the operators in the area. Also, while facility type is not specifically listed on the ticket, an excavator can often identify the type of facility based on who the operator is.
- In many instances operators can inform excavators of the location of their subsurface installations before or during an emergency excavation.
- Creates a record of the excavation.
- Operator needs to know that excavator plans on digging immediately in response to an emergency so that they can respond as fast as possible, which is especially important in cases involving high priority lines.

***Issue 3:*** *Should specific types of excavations, or excavations by specific actors, be exempt from notifying 811 for an excavation in response to an emergency?*

Proposal: No. All excavators conducting all types of excavations should notify 811 when

excavating in response to an emergency.

Rationale:

- An excavator may not know of all the subsurface installations in the area, even an excavator who is excavating around their own subsurface installation.
- There is no need to exempt a particular excavation type or actor from notifying 811 for an excavation in response to an emergency.

***Issue 4:*** *Should excavators who supply a notification for an excavation in response to an emergency be required to wait for operators to mark before beginning?*

Proposal: No. Do not create a new restriction for excavators to wait for operators to respond prior to an emergency excavation.

Rationale:

- Excavators may need to excavate in an emergency prior to an operator marking. The markings do not negate the emergency.

***Issue 5:*** *Should operators—or operators of certain types of facilities—be required to respond to a notification of excavation in response to an emergency more quickly than two days, not counting the date of notification?*

Proposal: No. Do not create new obligation for operators to respond more quickly to an emergency excavation (except as discussed in Issue 9).

Rationale:

- Many operators respond immediately to notifications of emergency excavation, and it is usually in their best interests to do so.
- Requiring operators to respond more quickly when an excavator submits an emergency excavation notification may lead to an incentive for excavators to misuse the emergency notification.

***Issue 6:*** *Should operators still be required to respond to an excavation in response to an emergency? If so, should they still be required to respond if the excavation has completed?*

Proposal: Yes, and yes. Retain operator requirement to respond by legal excavation start date and time (two days, not counting the date of notification).

Rationale:

- The operator may respond before the excavation begins; thus, the excavator would have an opportunity to benefit from the operator's knowledge before starting the

emergency excavation.

- A required response forces the operator to look at the ticket. An operator can check for high priority subsurface installations and other issues related to their lines quickly.
- Currently there is no mechanism for an operator to know that an excavation (emergency or not) is complete. Operators should not have the responsibility to determine whether an emergency excavation is complete.
  - Two-way electronic positive response could provide a mechanism for the excavator to communicate with the operator on the status of an emergency excavation, but that system is not currently in place.

### **Issues Not Discussed During the April Board Meeting**

Following the April meeting, staff identified the following issues that arise from requiring excavators to contact 811 for emergency excavations. The Board may wish to review and discuss prior to making a recommendation to the Governor and Legislature. The majority of these issues relate to operator and excavator responsibilities when the excavation is within 10 feet of a high priority subsurface installation. These issues are pre-existing and not specific to the notification exemption. Current law doesn't have special requirements for emergency 811 notifications, and the onsite meeting provisions in effect apply to excavation notices in response to an emergency.

***Issue 7:*** *Should an excavator making an emergency 811 notification identify the nature of the emergency they are excavating in response to?*

Proposal: Yes. Excavators should inform the 811 notification center of the nature of their emergency, and it should be listed on the 811 ticket.

Rationale:

- The 811 notification requires operator response. An operator sending a locator into a situation where there is an emergency should know the nature of the emergency to ensure that their personnel are prepared for it.
- Requiring an excavator to state the nature of the emergency may serve as a deterrent to excavators who wish to make emergency notifications in non-emergency situations to receive more expedient operator responses.

***Issue 8:*** *Should the excavator be required to delineate the excavation area of an emergency excavation? (GOV 4216.2 (a))*

Proposal: Yes. The excavator should be required to delineate the area that was excavated. The excavator does not, however, need to delineate prior to excavation.

Rationale:

- The excavator does not need to delineate prior to beginning excavation, as an operator arriving to the site when the excavation is ongoing can learn from the excavator where they need locate and mark. If the operator arrives first, the excavator should arrive shortly after to inform them of where to locate and mark.
- The excavator should still delineate, as the operator still needs to perform locate and mark pursuant to **Issue 6** above and needs to know where to do it.

**Issue 9:** *Should an operator's response to an excavation within 10 feet of a high-priority subsurface installation be modified for an emergency?*

Proposal: Yes. If the operator is notified of an emergency excavation within 10 feet of a high-priority subsurface installation, the operator should immediately notify the excavator of the presence of the high-priority subsurface installation using the contact information on the ticket.

Rationale:

- An operator can use the excavator's contact information on the ticket to immediately notify the excavator of the presence of a high-priority subsurface installation in the area of the emergency excavation.
- Excavator knowledge of nearby high priority subsurface installations allows for appropriate excavation and safety considerations to be made.

**Issue 10:** *If the operator notifies the excavator of a high-priority subsurface installation within 10 feet of the emergency excavation, must the excavator wait until the completion of the onsite meeting to begin excavation? (GOV 4216.2 (c))*

Proposal: No. If the operator notifies the excavator of a high-priority subsurface installation in the area of the emergency excavation, the excavator and operator must discuss the tools and methods of excavation and information that would assist in verifying location of the high priority line, but this discussion does not need to be onsite and does not need to occur before the initiation of the excavation.

Rationale:

- In the case of an emergency excavation near a high-priority subsurface installation, the operator and excavator must talk as soon as possible.
- The excavator should not be stopped from excavating in response to an emergency.
- Information can be provided to the excavator faster over the phone than through an on site meeting and once that information is transmitted, an on-site meeting may not be necessary.

***Issue 11:*** *Should current law be retained and the expiration date of a ticket apply to one created as a result of an emergency excavation notification? If an emergency excavation continues beyond the expiration date, should current law apply and the excavator be required to renew the ticket or create a new ticket? (GOV 4216.2 (e), (i))*

Proposal: Yes, and yes. Retain current law.

Rationale:

- Current law does not recognize types of tickets like an “emergency” ticket. To create a separate expiration date, and conditions related to special “emergency” tickets is unnecessary and would be unduly burdensome to all parties including the 811 notification centers.
- A ticket issued due to an emergency needs an indicator to alert operators of the existence of the emergency. However, the current ticket system expiration and renewal protocols are sufficient to handle emergency tickets and are familiar to the excavators and operators.

***Issue 12:*** *If an excavator conducting an emergency excavation discovers or causes damage to a subsurface installation, must they notify the 811 notification center? (GOV 4216.4 (c))*

Proposal: Yes. Retain current law.

Rationale:

- Operators need to be aware of damages to their facilities. Whether the damage was discovered or occurred as a part of a planned or an emergency excavation is irrelevant.
- It should not be burdensome for an excavator to understand and comply with damage notification requirements. Creating a new distinction for damage notifications for emergency excavations would add a decision point for excavators and complicate compliance with the current easy to follow reporting requirement.

## **RECOMMENDATION**

Staff recommends that the Board make the following recommendation to the Governor and Legislature and direct staff to include it in the Board’s 2024 Annual Report:

*The Board recommends the Governor and Legislature retain the current law allowing an excavator, in an emergency, to begin excavation prior to all operators responding but modify excavator and operator requirements regarding excavations initiated in response to an emergency as follows:*

- *Change: Require excavators to contact 811 immediately upon discovering the need for an emergency excavation. Require excavators to report the nature of the emergency in their notification.*
- *Change: Retain current law that requires excavators to delineate the excavation area prior to excavation, but for emergencies, permit the delineation to occur after contacting 811 and after the commencement of excavation.*
- *For emergency excavations within 10 feet of a high priority subsurface installation:*
  - *Retain current law that requires an operator, receiving notification of an excavation occurring within 10 feet of a high priority subsurface installation, to notify the excavator of the presence high priority subsurface installation.*
  - *Change the law to require the operator to notify the excavator of the presence of the high priority subsurface installations immediately upon learning of an excavation in response to an emergency, using the excavator’s contact information on the ticket.*
  - *Retain current law requiring the excavator and operator discuss the method and tools that the excavator will use during the excavation and the information the operator will provide to assist in verifying the location of the subsurface installation.*
  - *Change the law to allow the currently required “on site” meeting to occur remotely when related to emergency excavations.*