

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 297 (Durazo)
Version: March 15, 2021
Hearing Date: March 23, 2021
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Subsurface installations: penalties

DIGEST

This bill adds a civil penalty of up to \$100,000 for an operator or excavator who, after failing to follow certain safety requirements relating to subsurface installations, damages a subsurface installation and causes the release of hazardous gas or liquid.

EXECUTIVE SUMMARY

Current law provides a comprehensive set of safety measures (including the “call before you dig” requirement) designed to prevent excavators from inadvertently coming into contact with, or damaging, subsurface installations. These installations – such as underground gas lines – can cause massive and deadly damage if not treated with caution; damaged subsurface installations are also costly to repair and can require service interruptions. The law currently provides for civil penalties of up to \$25,000 for an excavator who negligently violates the safety measures and up to \$50,000 for an excavator who does so knowingly and willfully.

This bill, the Wade Kilpatrick Gas Safety Workforce Adequacy Act of 2021, would impose a civil penalty of up to \$100,000 on an operator or excavator who fails to comply with subsurface excavation safety requirements and causes damage to subsurface installations that results in the escape of dangerous gas or liquids, to serve as an additional deterrent against deliberate failures to comply with essential safety measures. In response to certain concerns raised by potential opponents of the bill, the author has requested that the bill be amended, so this analysis addresses the bill as proposed to be amended by the author.

This bill is sponsored by the Utility Workers of America and supported by the Sempra Energy Utilities – Southern California Gas (SoCalGas) and San Diego Gas and Electric (SDG&E) – and the California Labor Federation. It is opposed by the California Landscape Contractors Association. This bill passed out of the Senate Business, Professions and Economic Development Committee with a 14-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the “Dig Safe Act of 2016” (the Act) which, among other things, regulates subsurface excavation safety through a system of regional notification centers (RNCs) and requires operators to take certain safety precautions. (*See* Gov. Code, tit. 1, div. 5, ch. 3.1, art. 2, §§ 4216 et seq.) The Act includes the following relevant definitions:
 - a) “Excavator” means any person, firm, contractor or subcontractor, owner, operator, utility, association, corporation, partnership, business trust, public agency, or other entity that, with their own employees or equipment, performs any excavation. (Gov. Code, § 4216(h).) The definition excludes certain owners and lessors of real property who are not engaged as a contractor or subcontractor and do not require a permit for the excavation project. (*Ibid.*; *id.*, § 4216.8.)
 - b) “Operator” means any person, corporation, partnership, business trust, public agency, or other entity that owns, operates, or maintains a subsurface installation, but for purposes of membership in a regional notification center, does not include an owner of real property where subsurface installations are exclusively located if they are used exclusively to furnish services on that property and the subsurface facilities are under the operation and control of that owner. (Gov. Code, § 4216(o).) State and local agencies that own and operate subsurface installations are subject to the Act’s requirements. (*Id.*, § 4216.5.)
 - c) “Subsurface installation” means any underground pipeline, conduit, duct, wire, or other structure, except nonpressurized sewerlines, nonpressurized storm drains, or other nonpressurized drain lines. (Gov. Code, § 4216(s).)
 - d) “Ticket” means an excavation location request issued a number by the regional notification center. (Gov. Code, § 4216(t).)

- 2) Establishes the Dig Safe Board – which resides under the Office of the State Fire Marshall until January 1, 2022, at which point it will move to the Office of Energy Infrastructure Safety within the Natural Resources Agency – which performs the following tasks:
 - a) Coordinates education and outreach activities that encourage safe excavation practices;
 - b) Develops standards for safety practices in excavating around subsurface installations, and procedures and guidance in encouraging those practices; and
 - c) Investigates and enforces possible violations of the Dig Safe Act. (Gov. Code, §§ 4216.12, 4216.18, 4216.19, 4216.22.)

- 3) 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, an RNC. (Gov. Code, § 4216.1.)
- 4) Sets forth two alternative procedures for an excavator to commence a subsurface excavation:
 - a) The excavator notifies the appropriate regional notification center (RNC) of the excavator's intent to excavate a delineated area before beginning that excavation, as specified. In return, the RNC provides a ticket to the excavator, which must be renewed every 28 days of the excavation. Prior to the ticketed start time, the operator must locate and mark other subsurface installations in the area to be excavated and keep a record of any newly installed subsurface installations. If existing delineation marks are no longer visible, an excavator must notify the RNC and cease excavation until the installations are remarked. If an operator fails to identify subsurface installations as required, an excavator must inform the RNC of that failure. (Gov. Code, §§ 4216.2 & 4216.3.)
 - b) The excavator contacts the RNC to request a continual excavation ticket for an area of continual excavation, and the RNC notifies any member of the RNC that has a subsurface installation in the area under continual excavation. The operator(s) with subsurface installations in the area then must locate and mark those installations; if certain conditions are met, the excavator and operator(s) must have an onsite meeting to develop a plan to prevent damage to the subsurface installations. The continual ticket is valid for one year and may be renewed as needed. (Gov. Code, § 4216.10.)
- 5) Requires an excavator who discovers damage to a subsurface installation to immediately notify the operator; the excavator may contact the RNC for the operator's contact information. The excavator must call 911 emergency services upon discovering damage to a gas or hazardous liquid pipeline subsurface installation that results in the escape of flammable, toxic, or corrosive gas or liquid, or to a high-priority subsurface installation of any kind. In such cases, the excavator must also notify the RNC of the damage within 48 hours of the discovery. (Gov. Code, § 4216.4.)
- 6) Imposes civil penalties for violations of the Act:
 - a) Any operator or excavator who negligently violates the Act is subject to a civil penalty of up to \$10,000. (Gov. Code, § 4216.6(a)(1).)
 - b) Any operator or excavator who knowingly and willfully violates the Act is subject to a civil penalty of up to \$50,000. (Gov. Code, § 4216.6(a)(2).)¹

¹ The Dig Safe Act of 2016 also establishes a scheme of immunities and liabilities for operators and excavators relating to certain protective activities and damage to subsurface installations not relevant to this bill. (See Gov. Code, § 4216.7.)

- 7) Permits an action to enforce the Act and seek civil penalties to be brought by: the Attorney General, the district attorney, or the local or state agency that issued the permit to excavate. Additionally, the Dig Safe Board may enforce the Act on all persons except (1) contractors licensed by the Contractors' State License Board, (2) gas, electrical, and water corporations regulated by the Public Utilities Commission, and (3) operators of hazardous liquid pipeline facilities regulated by the Office of the State Fire Marshal. For these three categories, the respective governing agencies, not the Dig Safe Board, can administratively enforce the Act. (Gov. Code, § 4216.6(b)-(c).)
- 8) Provides that civil penalties collected in proceedings by the Dig Safe Board, the Registrar of Contractors, the Public Utilities Commission, or the Office of the State Fire Marshal shall be deposited into the Safe Energy Infrastructure and Excavation Fund. (Gov. Code, § 4216.(f).)

This bill, subject to the author's amendments in item 3 below:

- 1) Adds a new civil penalty of up to \$100,000 to be imposed on an operator or excavator who knowingly and willfully violated the provisions of the Dig Safe Act, and subsequently damaged a gas or hazardous liquid pipeline subsurface installation in a way that resulted in the escape of any flammable, toxic, or corrosive gas or liquid.

COMMENTS

1. Author's comment

According to the author:

Currently, if you are going to excavate around a subsurface installation, you are required by law to call the 811 notification center to ensure that you don't damage some critical infrastructure buried beneath the surface. This is the infrastructure that provides our energy, water, telecommunications, and so on.

It is no small thing when an excavator fails to make this call. Damaging some things below the surface is not only costly and potentially disruptive, but it can also be extremely dangerous to the workers and the public.

This bill is in honor of one such worker who tragically lost his life when a solar company failed to call 811 and damaged a gas line. SoCal Gas employee Wade Kilpatrick and his crew were called out to fix the problem and during their work, the leaking gas was ignited and Wade was killed in the explosion.

This tragedy could have been avoided had the solar company followed the law. More significant penalties will punish the bad actors and hopefully provide some incentive for others to simply call 811.

2. This bill, as amended by the author, adds an enhanced civil penalty for the most dangerous violations of subsurface installation safety laws

As bill supporter Sempra Energy Utilities explains, excavating without checking for subsurface installations is dangerous; while not every incident in which an excavator fails to perform the required checks for subsurface installations goes wrong, the consequences can be tragic – as they were for the bill’s namesake, Wade Kilpatrick. Mr. Kilpatrick’s death was senseless: the excavator in question did not call the designated 811 line so that the underground gas lines could be marked before SoCalGas’s workers began digging.² Mr. Kilpatrick was not the only victim of the excavator’s failure to follow basic procedures: the explosion when the gas line was hit also injured 15 people, including three firefighters.³ The city also had to block roads and several residents had to leave their homes as a result of the blast.⁴

Under current law, penalties for violating the pre-excavation steps intended to avoid subsurface installations – steps that likely would have prevented Mr. Kilpatrick’s death – max out at \$50,000 per violation. Compared to other California civil penalties, \$50,000 for a safety failure that can result in loss of life is remarkably low; by comparison, an automobile manufacturer who willfully sells a “lemon” is liable for a civil penalty of up to twice the cost of the vehicle, an amount that can easily exceed \$50,000.⁵

This bill, as amended by the author, would add a civil penalty of up to \$100,000 that could be levied on operators or excavators who knowingly and willfully engage in high-risk behavior that causes damage to a subsurface installation which leads to the escape of dangerous gas or liquid. Specifically, an operator or excavator would be liable for this higher penalty when they knowingly and willfully fail to follow the provisions of the Dig Safe Act – such as failing to notify a gas corporation of the need to locate and mark its subsurface installations prior to excavating or commencing an excavation before the gas corporation marks its subsurface installations – and the ensuing excavation causes damage to a gas or hazardous liquid pipeline subsurface installation resulting in the escape of any flammable, toxic, or corrosive liquid. This penalty would thus increase the cost of noncompliance with the Dig Safe Act, which will hopefully

² Shalby & Karlamangla, *Explosion in Murrieta neighborhood kills one, injures 15*, Los Angeles Times (Jul. 15, 2019), <https://www.latimes.com/local/lanow/la-me-house-explosion-murrieta-20190715-story.html> [last visited Mar. 6, 2021].

³ *Ibid.*

⁴ *Ibid.*; Shalby & Karlamangla, *Fatal gas line explosion in Murrieta a warning for home contractors*, Los Angeles Times (Jul. 16, 2019), <https://www.latimes.com/california/story/2019-07-16/murrieta-explosion-gas-line-1-dead-15-injured> [last visited Mar. 6, 2021].

⁵ See Civ. Code, § 1794(c).

encourage operators and contractors to comply with the commonsense safety steps established to avoid the needless loss of life and property that can occur when subsurface installations are damaged.

3. Author's Amendments

In response to concerns from potential opponents, the author wishes to amend the bill as set forth below. Amendment 1 provides for uniformity of application to operators and excavators, matching the existing civil penalties. Amendments 2-5 modify the criteria for the civil penalty so that, rather than limit the civil penalty to cases where a party repeatedly engaged in one of two specific violations of the Dig Safe Act and damaged a subsurface installation, the penalty may be imposed where a party knowingly and willfully violated any of the Dig Safe Act's provisions and damaged certain especially hazardous liquid or gas pipelines in a way that caused gas or liquid to escape. With Amendments 1-5 incorporated into the bill, the paragraph providing for the penalty will read:

Any operator or excavator who knowingly and willfully violates any of the provisions of this article and subsequently damages a gas or hazardous liquid pipeline subsurface installation in which the damage results in the escape of any flammable, toxic, or corrosive gas or liquid is subject to a civil penalty in an amount not to exceed one hundred thousand dollars (\$100,000).

Amendment 6 removes a provision awarding civil penalties awarded in court to the Energy Infrastructure and Excavation Fund.

Amendment 1

At page 2, line 11, after "Any," insert "operator or."

Amendment 2

At page 2, line 11, strike out "that fails to provide notice to a gas," strike out lines 12 and 13, in line 14, strike out "corporation marks its subsurface installations," and insert "who knowingly and willfully violates any of the provisions of this article."

Amendment 3

At page 2, line 15, after the first "a," insert "gas or hazardous liquid pipeline."

Amendment 4

On page 2, in line 15, after "installation," insert "in which the damage results in the escape of any flammable, toxic, or corrosive gas or liquid."

Amendment 5

At page 3, strike lines 4 to 14, inclusive.

Amendment 6

At page 4, in lines 29 and 30, strike out “that are described in subdivision (a)” and insert “pursuant to subdivisions (c) and (e).”

4. Arguments in Support

According to the bill’s sponsor, the Utility Workers of America:

Too many contractors and excavators are ignoring or intentionally defying the 811 dig alert requirements. The dig alert program requires individuals to contact the Regional Notification Center to first determine that there is no subsurface gas infrastructure before starting [an] excavation project. When they do not do that, there is the possibility that could damage or puncture a subsurface line. We know that tragedies can occur when that happens.

The genesis of this bill is one such tragedy[,] when UWUA member and SoCal Gas employee Wade Kilpatrick was killed when a solar contractor failed to follow the dig alert rules. That contractor received a nominal fine and no real penalties for violating the dig alert notification requirements. In fact, we are informed that this contractor continues to violate these rules even after Mr. Kilpatrick’s tragic death. We need meaningful penalties that will get the attention of these scofflaws so we can avoid future tragedies.

According to bill supporter Sempra Energy Utilities:

In 2017 there were just over 9,500 dig-in accidents in California; over 3,000 of those incidents were in Sempra Utilities territory alone. While most do not result in injury to individuals, each incident has the potential to cause significant harm to our employees, the public, and third-party excavators. In addition to the potential for human injury, these incidents are costly to excavators and to the infrastructure owners – causing work to halt, repairs to the infrastructure, and rescheduled work.

SoCalGas and SDG&E are committed to providing clean, reliable, and most importantly, safe energy for all our customers. SB 297 is an important step forward in increasing safety around underground utility infrastructure.

5. Arguments in opposition

According to bill opponent California Landscape Contractors Association (CLCA):

CLCA understands the need to have clear rules and regulations governing subsurface excavations to avoid collateral damage of gas lines and other infrastructure. [SB 297] though would double current civil penalties and does not differentiate penalties for contractors and non-contractors among other provisions.

SUPPORT

Utility Workers Union of America (sponsor)

California Labor Federation

Sempra Energy Utilities (Southern California Gas & San Diego Gas and Electric)

OPPOSITION

California Landscape Contractors Association

RELATED LEGISLATION

Pending Legislation:

AB 930 (Levine, 2021) awards attorney fees and costs in a civil action or arbitration between the operator of a subsurface installation and an excavator, arising from an excavation that results in property damage necessitating repair or replacement of the subsurface installation. AB 930 is pending before the Assembly Judiciary Committee.

Prior Legislation:

SB 1198 (Durazo, 2020) would have added the same enhanced civil penalty as SB 297, and also would have added requirements relating to gas corporations. SB 1198 was voluntarily pulled by the author, in light of the COVID-19-related bill restrictions, before it could be heard by the Senate Energy, Utilities and Communications Committee.

SB 865 (Hill, Ch. 307, Stats. 2020) renamed the California Underground Facilities Safe Excavation Board as the “Dig Safe Board” and will move the Dig Safe Board to the Office of Energy Infrastructure Safety within the Natural Resources Agency as of January 1, 2022. SB 865 also added a requirement that, starting in 2023, certain new subsurface installations be mapped using a geographic information system and be maintained as permanent records of the operator, and added the requirement that an

excavator notify the RNC within 48 hours of causing damage to certain subsurface installations.

AB 2334 (Levine, 2020) was substantially similar to this year's AB 930 (Levine) and would have awarded attorney fees and costs in disputes between the operator of a subsurface installation and an excavator, arising from an excavation that results in property damage necessitating repair or replacement of the subsurface installation. AB 2334 was held in the Assembly Judiciary Committee.

AB 1166 (Levine, Ch. 453, Stats 2019) delayed the start date of the requirement that every operator supply an RNC with an electronic positive response prior to the commencement of an excavation, from 2018 to 2021; and authorized the California Underground Facilities Safe Excavation Board to enact related regulations.

AB 1914 (Flora, Ch. 708, Stats. 2018) permitted, as of January 1, 2020, an excavator to use power-operated or boring equipment, as determined by the California Underground Facilities Safe Excavation Board, prior to determining the exact location of subsurface installations.

SB 661 (Hill, Ch. 809, Stats. 2016) established the Dig Safe Act of 2016, which replaced the existing safety regime for excavating around subsurface installations and established the governing body, the California Underground Facilities Safe Excavation Board, under the Office of the State Fire Marshal.

SB 119 (Hill, 2015) would have established the Dig Safe Act of 2015, and was substantially similar to the bill that established the Dig Safe Act of 2016 except that it would have established the California Underground Facilities Safe Excavation Board under the Contractors' State License Board. The bill was vetoed by Governor Brown, who expressed concern that the Contractors' State License Board was not the proper executive agency to administer the program.

PRIOR VOTES:

Senate Business, Professions and Economic Development Committee (Ayes 14, Noes 0)
