

Indiana Underground Plant Protection Advisory Committee

Penalty Schedule for violations of IC 8-1-26

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Purpose of this Document

This is a guidance document to assist the Indiana Underground Plant Protection Advisory Committee (“Committee”) in determining penalties under Indiana code chapter 8-1-26. It provides general principles for determining penalties. However, it is not meant to hinder case-by-case decision-making by the Committee based on specific facts of a case.

Guiding Principles for Penalty Schedule

- The objective of this schedule is to ensure public safety.
- The focus will be to educate parties and encourage compliance, rather than being punitive.
- Penalties should be imposed in steps, with each step more severe.
- Each step should have a set penalty, with the Committee having the ability to consider a variety of factors that could increase or decrease the penalty. The Committee should have the ability to reduce penalties if the contractor or operator shows a strong commitment to compliance.
- The applicable step (in the penalty schedule) should be based on a certain timeframe in order to credit the firm for going a certain period without violations.
- The 12-month period used in the schedule is based on when the violation occurred, not when it was reported or when matter was referred to Committee.

Penalty Schedules

Excavators

Non-Homeowners or Non-Tenants

Pursuant to IC 8-1-26-16(h) [notice], IC 8-1-26-16(i) [white lining], and IC 8-1-26-20(b) [two (2) foot clearance], the maximum civil penalty is \$10,000.

Initial violations	Warning letter
Second violation	Mandatory Training*
Third violation	(If after Training Window**) \$1,500 civil penalty, with chance to mitigate \$1,500 if respondent takes training
Fourth violation	(If after Training Window**) \$3,000 civil penalty, considering mitigating and aggravating circumstances
Fifth or more violation	(If after Training Window**) Escalates by \$500 civil penalty for every damage that occurs post Sept. 1, 2013 up to \$5,000, considering mitigating and aggravating circumstances. Penalties for additional violations will not continue to escalate unless there are aggravating or reckless circumstances in that particular case.

* The Mandatory Training penalty automatically converts to a \$5,000 civil penalty if training is not completed within 180 days of the Indiana Utility Regulatory Commission’s Final Order.

** The schedule is structured so that generally there is a 30-day Training Window after training is completed before additional penalties will accrue. The rationale is to give violators time to learn from the training before assessing additional penalties. As long as there is no evidence of recklessness or intentional damage, any additional violations that occur during the Training Window will not incur additional penalties. They will however, be counted when considering future penalties.

If a penalty is escalated, the next penalty will start at the level higher than the previous penalty. For example, if the first penalty is escalated to training (the second penalty level), the second penalty will be treated as a third penalty.

Penalty Escalation for Failure to Complete Mandatory Training

Any failure to complete	Add to the standard penalty \$1,500, with the chance to mitigate \$1,500 if the excavator takes training and completes a corrective action plan
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Penalty Escalation for Recklessness

“Recklessness” means actions marked by lack of proper caution, careless of consequences, or irresponsible. It also includes intentional disregard of the law.

Any violation	Mandatory training* and a monetary civil penalty of up to \$10,000
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Penalty Escalation for Having No Ticket

This applies when there is no evidence that a dig ticket or locates were requested. Using a ticket in someone else's name is not considered evidence of a ticket. It is considered to be a "no ticket" situation when an existing ticket has expired by 20 or more days.

First or second violation	Mandatory training
Violations after the mandatory training level	An additional \$1,000 fine will be added to the standard penalty

Penalty Escalation for Concealment of Damage

This applies when the excavator concealed the damage by using a leak clamp or other means of making unauthorized repairs, regardless of the number of prior violations.

First concealment violation	At minimum, mandatory training and a \$1,500 fine will be added to the standard penalty
Second concealment violation	At minimum, an additional \$5,000 fine will be added to the standard penalty
Third concealment violation	The Advisory Committee shall use its discretion to assess a fine of at least \$5,000 and consider requiring training and/or a corrective action plan

Penalty Escalation Based on Company Factors

Penalties may be escalated, in particular the adding of mandatory training, considering the following:

- How many violations the excavator has, in particular how many violations were recent
- The types of violations
- How recently the company has had training and how many employees attended
- Specific actions or inactions by the excavator that do not follow best excavation practices
- Other factors the Advisory Committee deems appropriate

Reducing Penalties – “Resetting” the Schedule

If a violation occurs at least 12 months after the previous violation, the schedule drops back to the third violation level unless there was only one prior violation; if so, the schedule drops back to the second violation.

The penalty will not be reduced for an excavator that has failed to complete mandatory training within 180 days of the Final Order or has failed to pay or make payment arrangements for a civil penalty within 90 days of the Final Order. Under this circumstance, an excavator must complete the required training or pay the required civil penalties, as defined herein, before becoming eligible for reduced penalties. The eligibility for a "reset" will start again with a 12-month period that occurs after the training(s) and civil penalty(s) have been satisfied.

Multiple Locations or Divisions

An entity with multiple locations and staff will be considered one entity for purposes of the penalty schedule. Entities will only be treated as separate if they can provide discreet federal ID numbers. Any entity that is currently treated as separate entities will be recombined and will continue at one step above the lowest penalty level the entity currently has or at the fourth violation level, whichever is lower.

Factors to Decrease or Increase Penalties

Factors to consider that might warrant lesser penalties:

- Factors the Advisory Committee deems appropriate

Generally, penalties will not be reduced simply because the respondent already completed voluntary training or a corrective action plan. However, voluntary training and the completion of corrective action plans are encouraged to increase safety and reduce future violations and associated penalties.

Factors to consider that might warrant stronger penalties:

- Failure to report damage to Indiana 811
- Failure to report release of gas to Indiana 811 and local police and fire departments having jurisdiction (911)
- Attempts to temporarily repair the damage or stop the flow of gas
- Recklessness¹
- Physical injury
- Property damage of over \$10,000
- Failure to pay previous civil penalties or take required corrective action
- Other factors the Advisory Committee deems appropriate

Homeowners and Tenants

Pursuant to IC 8-1-26-16(h) [notice], IC 8-1-26-16(i) [white lining], and IC 8-1-26-20(b) [two (2) foot clearance], the maximum civil penalty is \$10,000.

For all violations occurring prior to January 1, 2012	Warning letter
Initial violations where date of damage is January 1, 2012 or later	Warning letter ²
Second and subsequent violation within 12 months of the previous damage date	\$100, escalating by \$100 for each occurrence, considering mitigating and aggravating circumstances

Reducing Penalties – “Resetting” the Schedule

If a violation occurs at least 12 months after the previous violation, the schedule starts over (i.e. that violation is considered an initial violation).

Factors to Decrease or Increase Penalties

Factors to consider that might warrant lesser penalties:

- Level of culpability
- Shows good faith effort to comply after notice of violation
- Amount of damage or threat caused by noncompliance
- Ability to pay
- Other factors the Advisory Committee deems appropriate

Factors to consider that might warrant stronger penalties:

¹ “Recklessness” means actions marked by lack of proper caution, careless of consequences, or irresponsible. It would also include intentional disregard of the law.

² Per IC 8-1-26-23(j), first time homeowner violators cannot be assessed a penalty of monetary penalties or a corrective action plan unless the violation “result[ed] in physical harm to a person.”

- Recklessness
- Physical injury
- Property damage of over \$10,000
- Failure to pay previous civil penalties or take required corrective action
- Other factors the Advisory Committee deems appropriate

Operators

Operators Who Fail to Locate or Mislocate

Pursuant to IC 8-1-26-18(h) [mislocate or failure to locate], the maximum civil penalty is \$1,000.

Initial violations	Warning letter
Second or more violation (violations occurring January 1, 2012 or later are counted as within 12 months of the date of damage of a previous violation)	Training once between the time of the second violation to 30 days after training is complete; failure to complete training as required will result in a civil penalty of \$1,000
Third or more violation	(after training is complete) \$1,000 or lower, considering mitigating circumstances
<i>For ANY violations occurring where there is evidence of recklessness, regardless of date of occurrence</i>	Minimum \$500 penalty

Reducing Penalties – “Resetting” the Schedule

If a violation occurs at least 12 months after the previous violation, the schedule drops back to the second violation level.

Factors to Decrease or Increase Penalties

Factors to consider that might warrant lesser penalties

- Overall level of company compliance
- Factors outside the operator’s control or difficult to control, including:
 - Broken tracer wire
 - Blocked access to the property to be located
 - Underground congestion (i.e. other types of underground facilities in vicinity)
 - Weather
 - Change in pipeline material
 - Inserted lines (where plastic gas line is pushed through an old steel line)
 - Depth of facility
 - Gas line has one or more drastic change of direction.
- Other factors the Advisory Committee deems appropriate

Factors to consider that might warrant stronger penalties:

- Recklessness
- Physical injury
- Property damage of over \$10,000
- Failure to pay previous civil penalties or take required corrective action
- Other factors the Advisory Committee deems appropriate

Operators Who Fail to Join the Association

A warning letter shall be sent by the Committee to operators who have been identified as those who are required to but have not yet joined the Association, as required by IC 8-1-26-15. The letter will give the operator a window of approximately ninety (90) days to join the Association.

Pursuant to IC 8-1-26-15(d) [failure to join association], the maximum civil penalty is \$100 per violation (one violation per day).

Failure to join within 3 months of the due date in the warning letter	\$500
Failure to join within 6 months of the due date in the warning letter	\$5,000
Failure to join within 9 months of the due date in the warning letter	\$10,000
Failure to join within 12 months of the due date in the warning letter	\$21,000
Failure to join within 15 months of the due date in the warning letter, and for each additional 3 month period	\$100 for every add'l day of noncompliance

Other

Facility Locate Markings: Removal, Damage, or Alteration

Pursuant to IC 8-1-26-18(h) [altering facility markings], the maximum civil penalty is \$10,000.

Initial violation	Warning letter
Second violation within 12 months of the previous damage date	\$2,500 civil penalty
Third violation within 12 months of the previous damage date	\$5,000 civil penalty
Fourth and subsequent violations within 12 months of the previous damage date	\$10,000 civil penalty

Reducing Penalties – “Resetting” the Schedule

If a violation occurs at least 12 months after the previous violation, the schedule starts over (i.e. that violation is considered an initial violation).

False Emergency Reporting

Pursuant to IC 8-1-26-19(c) [false emergency], the maximum civil penalty is \$1,000.

Initial violations	\$500 civil penalty ³
Second and subsequent violations	\$1,000 civil penalty

Factors to Decrease Penalties

Factors to consider that might warrant lesser penalties

- Other factors the Advisory Committee deems appropriate

³ Note, per IC 8-1-26-23(j), a first time violator who is a homeowner or tenant performing work on their own residential property outside an operator’s easement or right of way cannot be issued a fine or corrective action plan unless the violation resulted in physical harm to a person, as defined in IC 8-1-26.

Sample Case Timeline

1/1/18 damage date	Warning letter for first violation
6/1/18 damage date	Training for second violation
Time lapse:	
6/1/18	damage occurs
6/8/18	damage reported to IURC (about a week after damage)
6/10/18	letter to excavator requesting information
7/10/18	staff investigates after 30-day window for excavator to send information
7/30/18	Case is ready for review by Advisory Committee
8/23/18	Case is heard by Advisory Committee
8/25/18	Letter to excavator giving opportunity for public hearing
10/4/18	If no request for hearing in 40 days, case is approved by IURC
10/5/18	Letter to excavator requiring training
10/20/18	Excavator must schedule training within this 15-day window
11/20/18	Excavator must take training within this 30-day window
12/20/18	30-day window for training to sink in and be delivered back to company through train-the-trainer

(total time = 202 days or about 7 months)

Training

For Excavators

Standard training (mandatory or optional) - Trained employees must include at least one attendee that is a member of management or have a supervisory role; other employees may include safety officers, excavators, or those responsible for calling in locates, scheduling work, managing the operations, or actual excavation. At least three (3) employees must be trained, unless the company has less than three (3) total employees on staff. In that case, all employees must be trained. Additional employees are encouraged to attend training, but it is not required. Respondents who utilize agents or outside contractors are encouraged to have a member of those companies attend training, but it is not required. For violations by homeowners and tenants, only the violator is required to attend the training.

Additional mandatory training - If a company is required to take training more than once, the training shall include at minimum the employee that caused the damage or their supervisor if the employee is no longer with the company.

Online training – Training is available online at www.safedigindiana.com. Trained employees may include supervisors, management, safety officers, excavators, or those responsible for calling in locates, scheduling work, managing the operations, or actual excavation. Training can be accessed by desktop and laptop computers, tablets, and smart phones. All information is written and videos and animations are closed-captioned. Modules take about 15 minutes each to complete. Penalties will denote how many employees must complete the penalty and which modules must be completed.

For Operators:

Trained employees must include at least one attendee that is a member of management or have a supervisory role; other employees may include operator qualification personnel, internal person supervising locating, or external personnel (contractors) supervising locating. At least three (3) employees must be trained, unless the company has less than three (3) total employees on staff. In that case, all employees must be trained. Additional employees are encouraged to attend training, but it is not required. Respondents who utilize agents or outside contractors are encouraged to have a member of those companies attend training, but it is not required.

Generally

To be “trained” means paying in full prior to the training the participant charge and any charge for a translator if required by the attendee, attending the training, and successfully passing the examination at the end of training through Baker-Peterson, LLC. Additional vendors may be considered.

Training shall be completed within 60 days of the date of the Final Order.

Corrective Action Plan

A corrective action plan is one that is developed to avoid future violations of IC 8-1-26. The plan should at minimum include the following:

- A listing of possible violations under IC 8-1-26.
- For each of the company’s violations, steps that the company will take moving forward to avoid these violations. This should include but is not limited to written procedures, review of existing procedures, and employee discipline and/or training.

Each plan will be assigned to one member of the Committee for review and presentation to the entire Committee for approval. Should be developed and provided to the Committee for approval within 2 months. The plan should be fully implemented 4 months after that.

Long Term Plan

At a minimum, the Committee will consider the following on an annual basis:

- Should the Committee consider the number or percentage of digs for excavators or locates for operators when applying the penalties (ex. Company A has 10 violations in 2012, and they did 10 digs. Company B has 10 violations in 2012, and they did 1,000 digs. Should they be treated the same?)
- Are the monetary penalties set at an appropriate level?
- Generally, do the penalties set out appear appropriate?
- Is there evidence that this schedule changed behavior in a positive way?
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