

# **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 (“Advisory Committee”) in recommending penalties under Indiana Code chapter 8-1-26 (Indiana 811 Law). It provides general principles for recommending penalties. However, it is not meant to hinder case-by-case decision-making by the Advisory Committee based on specific facts of a case.

The Indiana 811 Law requires the Pipeline Safety Division (“Division”) of the Indiana Utility Regulatory Commission (“IURC”) to make findings of violations. The Advisory Committee reviews those findings and makes penalty recommendations to the IURC. Upon receiving a recommendation from the Advisory Committee, and after notice and opportunity for a public hearing, the IURC upholds or reverses the findings of violations by the Division and approves or disapproves the Advisory Committee recommendations.

## **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 recommendation, with the Advisory Committee having the ability to consider a variety of factors that could increase or decrease the penalty. The Advisory Committee has the ability to reduce penalty recommendations if the contractor or operator shows a strong commitment to compliance.
- The penalty level should be reset after a certain timeframe, in order to credit the excavator for going a certain period of time without violations.
- The 12-month period used in the schedule is based on when the violation occurred, not when it was reported or when the matter was referred to Advisory Committee.

## The Enforcement Process

- The enforcement process begins with the report of a damage to a pipeline facility or a non-damage violation of the Indiana 811 Law. When a report is received by the Division, it contacts the excavator to request more information. Once evidence is gathered, the Division investigates the incident to find whether a violation of the Indiana 811 Law has occurred.
- If the Division finds a violation, it sends a letter to the respondent notifying them of the upcoming meeting of the Advisory Committee, along with the Division's Investigation Summary Report. In preparation for the meeting, an Advisory Committee member reviews the evidence and finding of violation, then determines the appropriate penalty recommendation in accordance with this penalty schedule. At the Advisory Committee meeting, the Advisory Committee votes on the recommended penalty.
- After the Advisory Committee meeting, the IURC sends the respondent a letter to notify them of the recommended penalty and providing information about the respondent's right to request a hearing. The respondent has thirty days from the date of the letter to request a hearing to contest the finding of violation or recommended penalty, but must notify the IURC General Counsel's office in writing ten days before requesting a hearing. If the respondent is a legal entity and not an individual person, the respondent must hire an attorney to request a hearing and handle the discovery and proceedings.
- If the respondent does not request a hearing, the IURC will, approximately two months later, issue a Final Order on the finding of violation and the recommended penalty and the order will be sent to the respondent along with a letter. **The respondent has 90 days from the date of the order to comply with the penalty.**

## Definitions

**Ticket** – A “ticket” or “dig ticket” or “811 ticket” or “locate request” is created when a person contacts Indiana 811 to provide notice of the person's intent to excavate.

**Occupant Excavator** – An occupant excavator, as determined by the Advisory Committee, typically means an individual working as a homeowner, a volunteer for a non-profit entity, or a tenant.

**Person** -- The term “person” means an individual, a corporation, a partnership, a limited liability company, an association, or other entity organized under the laws of any state. The term “person” includes state, local, and federal agencies.

**Professional Excavator** – A Professional excavator is an excavator that is not considered an occupant excavator.

# 1. Professional Excavators

## 1.1 The Standard Penalty Schedule Applies to the Following Code Violations:

Code	Description
IC 8-1-26-16(h)	Failure to provide notice of excavation (i.e., obtain a ticket) (first or second violation begins at training level)
IC 8-1-26-16(h) (Prior)	Performing excavation or demolition prior to two working days from the ticket request date
IC 8-1-26-16(h) (expire)	Performing excavation or demolition after the expiration of the ticket, up to 20 days after the expiration of the ticket
IC 8-1-26-16(h) (out)	Performing excavation outside of the requested locate area
IC 8-1-26-20(a)(1)	Failure to plan excavation to avoid damage or interference with underground facilities
IC 8-1-26-20(a)(2)	Failure to maintain two (2) feet clearance with mechanized equipment
IC 8-1-26-20(a)(3)(a)	Failure to notify Indiana 811 when there is evidence of an unmarked pipeline facility in the area of the excavation
IC 8-1-26-20(a)(3)(b)	Failure to notify Indiana 811 when locate markings have become illegible

## 1.2 Standard Penalty Schedule for Professional Excavators

First violation	Training (converts to a \$5,000 civil penalty if training is not completed within 90 days from the date of the IURC's Final Order)
Second violation Also known as the "reset level"	\$1,500 civil penalty with the option to complete training within 90 days from the date of the IURC's Final Order to reduce the civil penalty by \$1,500.
Third violation	\$3,000 civil penalty
Fourth or more violations	Civil penalties escalate by \$500 for every damage that occurs up to \$5,000

- For Excavators that previously received a warning letter for a first violation, a second violation will result in mandatory training. Subsequent violations will follow the Standard Penalty Schedule accordingly.
- 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 the second penalty level, the second penalty will be treated as a third penalty.

## 1.3 Penalty for Having No Ticket – IC 8-1-26-16(h)

According to Indiana Code 8-1-26-16, the person responsible for excavation or demolition must notify Indiana 811 of the person's intent to excavate or demolish by submitting a ticket. The term "person" means an individual, a corporation, a partnership, a limited liability company, an association, or other entity organized under the laws of any state. The term "person" includes state, local, and federal agencies.

Performing excavation or demolition using a ticket that is in someone else’s name is equivalent to having no ticket.

It is also considered to be a “no ticket” situation when a previous ticket has been expired for 20 or more days.

First violation	Training (converts to a \$5,000 civil penalty if training is not completed within 90 days from the date of the IURC’s Final Order)
Subsequent Violations	Follows the Standard Penalty Schedule, plus an additional \$1,000 civil penalty for having no ticket

### **1.4 Aggravating Factors the Advisory Committee May Consider to Escalate Penalties for Violations by Professional Excavators**

The Advisory Committee may recommend additional penalties (that is, in addition to the standard penalties) for aggravating circumstances:

Failure to complete training in previous case	Add \$1,500 to standard penalty with chance to mitigate \$1,500 if the excavator completes training
Self-repair	Add \$1,500 to standard penalty
Concealment	1 <sup>st</sup> concealment: Add training plus \$1,500 to standard penalty 2 <sup>nd</sup> concealment: Add additional \$5,000 to standard penalty 3 <sup>rd</sup> concealment: Add additional \$5,000 and Advisory Committee may use its discretion to require training **Penalties may be increased up to \$10,000 depending on circumstances.
Recklessness “Recklessness” means actions marked by lack of proper caution, careless of consequences, or irresponsibility. It also includes intentional disregard of the law.	Training plus monetary civil penalty of up to \$10,000, depending on the severity of the recklessness as determined by the Advisory Committee.

In addition to the foregoing factors, the Advisory Committee considers other factors that might warrant more severe penalties:

- Failure to report the damage to Indiana 811
- Failure to report release of gas or hazardous liquid to Indiana 811 and local police and fire departments having jurisdiction (911)
- Attempts to temporarily repair the damage or stop the flow of gas or hazardous liquid
- Physical injury
- Property damage of over \$10,000
- Failure to pay previous civil penalties
- Level of culpability
- Amount of damage or threat caused by noncompliance
- Other factors the Advisory Committee deems appropriate

Penalties may be escalated, or training added, to the standard penalties, based on certain company factors as well:

- How many violations the excavator previously committed
- How many previous violations occurred recently
- The types of violations
- How recently the company has undergone training
- Specific actions or inactions by the excavator that do not follow best excavation practices

## **1.5 Mitigating Factors That the Advisory Committee Considers When Reducing Penalties for Professional Excavators**

The Advisory Committee may consider whatever factors it deems appropriate to reduce penalties. Generally, penalties will not be reduced simply because the respondent already completed voluntary training. However, voluntary training is encouraged to increase safety and reduce future violations and associated penalties.

## **1.6 “Resetting” The Schedule for Professional Excavators**

If a violation occurs more than 365 days after the previous violation, the schedule drops back to the second violation level, also known as the “reset level”. The schedule will not reset for an excavator that has failed to complete previously ordered training and/or has failed to pay previously ordered civil penalties. If an excavator has failed to complete a previously ordered training and/or pay a previously ordered civil penalty, the excavator must complete the previously ordered training and/or pay the previously ordered civil penalty before becoming eligible for reduced penalties.

## **1.7 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 discrete federal ID numbers. If it is subsequently discovered that the entities do not have discrete federal ID numbers, then the entities that are currently treated as separate 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.



## 2. Occupant Excavators

An occupant excavator, as determined by the Advisory Committee, typically means an individual working as a homeowner, a tenant, or a volunteer for a non-profit entity.

### 2.1 Penalty Schedule for Occupant Excavators

Initial Violation	Warning Letter (Per IC 8-1-26-23(j), first time occupant excavators cannot be assessed a penalty of monetary penalties unless the violation “result(ed) in physical harm to a person.”
Second and subsequent violation(s) within 12 months of the previous damage date	\$100, escalating by \$100 for each occurrence, considering mitigating and aggravating circumstances

### 2.2 Aggravating Factors the Advisory Committee Considers to Escalate Penalties for Violations by Occupant Excavators

The Advisory Committee may recommend additional penalties in addition to the penalty for aggravating circumstances:

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

### 2.3 Mitigating Factors the Advisory Committee Considers to Reduce Penalties for Violations by Occupant Excavators

The Advisory Committee may recommend a reduced penalty for mitigating circumstances:

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

### 2.4 “Resetting” the Schedule for Occupant Excavators

If a violation occurs more than 365 days after the previous violation, the schedule starts over (i.e. that violation is considered an initial violation for the purpose of calculating the penalty).

### 3. Operators

#### 3.1 Penalties for Operators Who Fail to Locate or Mislocate IC 8-1-26-18(h)

Pursuant to IC 8-1-26-18(h), the maximum civil penalty is \$1,000.

Initial Violation	\$1,000 or lower, considering mitigating circumstances
Second or more violation	\$1,000

#### 3.2 Aggravating Factors the Advisory Committee Considers to Escalate Penalties for Violations by Operators

The Advisory Committee may recommend additional penalties in addition to the penalty for aggravating circumstances:

- 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

#### 3.3 Mitigating Factors That the Advisory Committee Considers When Reducing Penalties for Operators

- 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 line is pushed through an old steel line)
  - Depth of facility
  - Pipeline facility has one or more drastic change of direction.
- Other factors the Advisory Committee deems appropriate.

#### 3.4 Operators Who Fail to Join The Association IC 8-1-26-15(d)

Pursuant to IC 8-1-26-15(d), the maximum civil penalty for failing to join the association (Indiana 811) is \$100 per violation (one violation per day).

Initial violation	Warning Letter
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 additional day of non-compliance
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## 4. Penalties Applicable to Persons Who Violate IC 8-1-26-18(j) and IC 8-1-26-19(c)

### 4.1 Facility Locate Markings: Removal, Damage, or Alteration IC 8-1-26-18(j)

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

Initial violation	\$1,000 civil penalty
Second violation	\$2,500 civil penalty
Third violation	\$5,000 civil penalty
Fourth and subsequent violations	\$10,000 civil penalty

### 4.2 False Emergency Reporting IC 8-1-26-19(c)

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

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

\*The Advisory Committee may recommend a reduced penalty for other factors the Advisory Committee deems appropriate.

\*\*Per IC 8-1-26-23(j), a first-time violator who is an occupant excavator performing work on their own residential property outside an operator’s easement or right of way cannot be issued a civil penalty unless the violation resulted in physical harm to a person, as defined in IC 8-1-26.

## 5. Training

### 5.1 Mandated Training for Excavators

For the purposes of required training, to be “trained” means: (1) paying in full the participant charge and any charge for a translator if required by the attendee; (2) attending the instructor-led training, and (3) successfully passing the examination at the end of the instructor-led training. **Only instructors and instructor-led trainings approved by the IURC will fulfill penalty requirements for penalties ordered by the IURC.**

The employees to be trained must include at least one attendee that is a member of management or has 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 an individual excavator, only the violator is required to attend the training.

**Multiple required trainings** – If a company is required to take more than one training stemming from multiple cases, the subsequent trainings shall include employees that were not previously trained. A company with overlapping periods to complete multiple trainings may train the necessary employees at the same time provided the company pays for the instructor-led trainings for each case. For example, a company subject to two training requirements may train at least six (6) employees at the same time but pays for two instructor-led trainings. A company that has less than six (6) employees must complete two trainings on two different occasions, with each instructor-led training including at least three (3) employees. A company that has less than three (3) employees must train all employees on two different occasions.

## **5.2 Voluntary Online Education**

Free voluntary online educational modules are available online at [www.safedigindiana.com](http://www.safedigindiana.com). This voluntary, extra education does not fulfill any training required under this penalty schedule or ordered by the IURC. The online education at [www.safedigindiana.com](http://www.safedigindiana.com) is a public service offered by the IURC and is a free tool that homeowners and companies can utilize to pro-actively educate its workforce to prevent damages to underground facilities. This self-directed education is suggested for homeowners, supervisors, management, safety officers, excavators, or those responsible for calling in locates, scheduling work, managing the operations, or actual excavation. The educational modules 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. There is a quiz at the end of each module and a certificate is provided for successful completion of each module.