

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 24 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

Commercial Excavators

Pursuant to IC 8-1-26-16(g) [notice], IC 8-1-26-16(h) [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
Second or more violation (violations occurring January 1, 2012 or later are counted as within 24 months of the date of damage of a previous violation)	Training once between the time of the second violation date of damage to thirty (30) days after training is complete; failure to complete training as required will result in a civil penalty of \$5,000
Third or more violation	(If after training period) \$1,500 civil penalty, with chance to mitigate \$750 if respondent takes training and completes corrective action plan
Fourth or more violation	(If after training period) \$3,000 - \$10,000 civil penalty, considering mitigating and aggravating circumstances
<i>For ANY violations occurring where there is evidence of recklessness or concealment, regardless of date of occurrence</i>	Minimum \$500 penalty and mandatory training

If a violation occurs at least 24 months after the previous violation, the schedule starts over (i.e. that violation is considered an initial violation). The schedule is structured so that there is a thirty-day window of time 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. Abuses of this should be minimal because where there is evidence of recklessness or concealment, there will be escalating \$500 fines.

Factors to consider that might warrant lesser penalties:

- Self reporting of incident
- Level of culpability
- Shows good faith effort to comply after notice of violation
- Primary business does not normally involve excavation
- Agreeing to a corrective action plan sooner than required
- Amount of damage or threat caused by noncompliance
- Overall level of company compliance
- Ability to pay
- Safety history (percentage of damages versus number of total excavations per year)
- Other factors the Advisory Committee deems appropriate

Factors to consider that might warrant stronger penalties:

- Failure to report damage to Indiana 811, especially where gas is leaking
- Failure to report release of gas to Indiana 811 and local police and fire departments having jurisdiction
- Concealment of damage through the use of a leak clamp or other means
- 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

Sample Schedule

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

Civil monetary penalties may now accrue for cases with date of damage of 12/21/12 or later.

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

Non-commercial Excavators (Homeowners/Tenants, etc.)

Pursuant to IC 8-1-26-16(g) [notice], IC 8-1-26-16(h) [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 24 months of the previous damage date	\$100, escalating by \$100 for each occurrence, considering mitigating and aggravating circumstances

If a violation occurs at least 24 months after the previous violation, the schedule starts over (i.e. that violation is considered an initial violation).

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:

- 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

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.”

Operators

Operators Who Fail to Locate or Mislocate

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

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
Second or more violation (violations occurring January 1, 2012 or later are counted as within 24 months of the date of damage of a previous violation)	Training once between the time of the second violation to thirty (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

If a violation occurs at least 24 months after the previous violation, the matrix starts over (i.e. that violation is considered an initial violation). The schedule is structured so that there is a thirty-day window of time 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. Abuses of this should be minimal because where there is evidence of recklessness or concealment, there will be escalating \$500 fines.

Factors to consider that might warrant lesser penalties

- Self reporting of damage
- Level of culpability
- Shows good faith effort to comply after notice of violation
- Amount of damage or threat caused by noncompliance
- Overall level of company compliance
- Ability to pay
- 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 three (3) months of the due date in the warning letter	\$500
Failure to join within six (6) months of the due date in the warning letter	\$5,000
Failure to join within nine (9) months of the due date in the warning letter	\$10,000
Failure to join within twelve (12) months of the due date in the warning letter	\$21,000
Failure to join within fifteen (15) months of the due date in the warning letter, and for each additional three (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 violations where date of action is after June 24, 2011	Warning letter ³
For all violations occurring prior to June 24, 2011 (effective date of administrative rule 170 IAC 5-5) (all violations prior to January 1, 2012 will count as a single violation for purposes of penalty increase within the matrix)	Warning letter
Second violation within 24 months of the previous damage date	\$2,500 civil penalty
Third violation within 24 months of the previous damage date	\$5,000 civil penalty
Fourth and subsequent violations within 24 months of the previous damage date	\$10,000 civil penalty

If a violation occurs at least 24 months after the previous violation, the matrix starts over (i.e. that violation is considered an initial violation).

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.

False Emergency Reporting

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

Initial violations where date of reporting is after June 24, 2011	Warning letter ⁴
For all violations occurring prior to June 24, 2011 (effective date of administrative rule 170 IAC 5-5) (all violations prior to January 1, 2012 will count as a single violation for purposes of penalty increase within the matrix)	Warning letter
Second violation within 24 months of the previous damage date	\$500 civil penalty
Third violation within 24 months of the previous damage date	\$1,000 civil penalty
Fourth and subsequent violations within 24 months of the previous damage date	\$1,000 civil penalty

If a violation occurs at least 24 months after the previous violation, the matrix starts over (i.e. that violation is considered an initial violation).

Training

For Excavators

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 non-commercial violations, only the violator is required to attend the training.

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 (formerly Utility Consulting Professionals, Inc.). Additional vendors may be considered.

⁴ 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.

Training shall be scheduled by the violating company within fifteen (15) days of receipt of their notice from the IURC. Training shall be successfully completed as outlined above within thirty (30) days of scheduling the course.

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?