

1 State of Arkansas
2 93rd General Assembly
3 Regular Session, 2021
4

A Bill

HOUSE BILL 1364

5 By: Representative Pilkington
6 By: Senator L. Eads
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS UNDERGROUND FACILITIES
10 DAMAGE PREVENTION ACT; TO CREATE THE ARKANSAS
11 UNDERGROUND FACILITIES DAMAGE PREVENTION ENFORCEMENT
12 BOARD; AND FOR OTHER PURPOSES.
13
14

Subtitle

15 TO AMEND THE ARKANSAS UNDERGROUND
16 FACILITIES DAMAGE PREVENTION ACT; AND TO
17 CREATE THE ARKANSAS UNDERGROUND
18 FACILITIES DAMAGE PREVENTION ENFORCEMENT
19 BOARD.
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23 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
24

25 SECTION 1. Arkansas Code § 14-271-104 is amended to read as follows:
26 14-271-104. ~~Penalties—Civil remedies~~ Civil penalties.

27 (a)(1) ~~Except as provided in subdivision (a)(2) of this section, any A~~
28 ~~person who violates any provisions of this chapter shall be~~ undergo training
29 in underground facilities damage prevention according to a training program
30 developed by the Arkansas Underground Facilities Damage Prevention
31 Enforcement Board and administered by the One Call Center.

32 (2) A person who violates this chapter may be subject to a civil
33 penalty not to exceed two thousand five hundred dollars (\$2,500) for each
34 violation to induce compliance with this chapter and as determined under a
35 tiered penalty structure adopted by the board under § 14-271-117.

36 ~~(2)(3)~~ (3) Operators of underground pipeline facilities and



1 excavators shall, upon violation of any applicable requirements of 49 C.F.R.
2 Part 198, Subpart C, or 49 U.S.C. § 60114(b), concerning marking facilities;
3 49 U.S.C. § 60114(d), concerning applicability to excavators; or 49 U.S.C. §
4 60118(a), concerning general waivers, as in effect on February 2013, unless
5 excepted under § 14-271-109, and damage to an interstate or intrastate
6 natural gas pipeline facility or an interstate or intrastate hazardous liquid
7 pipeline facility, be subject to civil penalties in an amount not to exceed
8 two (2) times the amount of property damage to the interstate or intrastate
9 natural gas pipeline facility or an interstate or intrastate hazardous liquid
10 pipeline facility up to a maximum of two hundred thousand dollars (\$200,000)
11 for each violation for each day that the violation persists, except that the
12 maximum civil penalty shall not exceed two million dollars (\$2,000,000) for
13 any related series of violations.

14 (b)(1) ~~Actions to recover the penalties provided for in this section~~
15 ~~shall be brought by the Attorney General, the county prosecutor, or the city~~
16 ~~attorney~~ may be brought by the board, at the request of any person, ~~in the~~
17 ~~circuit court in the county in which the cause, or some part thereof, arose~~
18 ~~or in which the defendant has its principal place of business or resides~~ by
19 filing a complaint with the board.

20 (2) All penalties recovered in ~~any such~~ an action under
21 subdivision (b)(1) of this section shall be paid into the ~~general fund of the~~
22 ~~state, county, or municipality that prosecutes the action~~ Underground
23 Facilities Damage Prevention Fund.

24 (c) The Attorney General, ~~the~~ a county prosecutor, or ~~the~~ a city
25 attorney in the county in which an action arises or in which the defendant
26 has its principal place of business or resides ~~shall~~ may, ~~at the request of~~
27 ~~any person~~, bring an action in a court of competent jurisdiction to enforce
28 the civil penalties of this section or to enjoin any a violation of this
29 chapter or 49 C.F.R. Part 198, Subpart C, committed by ~~operators of~~
30 ~~underground pipeline facilities and excavators~~ a person.

31 (d) ~~Nothing in this chapter shall be construed to~~ This chapter does
32 not modify or repeal existing laws pertaining to the tort liability of local
33 governments and their employees.

34 (e) This chapter does not affect any civil remedies for personal
35 injury or property damage, including underground facilities, except as
36 otherwise specifically provided for in this chapter.

1 (f) This section ~~shall~~ does not apply to:

- 2 (1) The State Highway Commission;
- 3 (2) The Arkansas Department of Transportation;
- 4 (3) An officer or employee of the commission or Arkansas
5 Department of Transportation;
- 6 (4) A county judge; or
- 7 (5) A county road department.

8
9 SECTION 2. Arkansas Code Title 14, Chapter 271, Subchapter 1, is
10 amended to add additional sections to read as follows:

11 14-271-116. Arkansas Underground Facilities Damage Prevention
12 Enforcement Board – Creation – Members.

13 (a) The Arkansas Underground Facilities Damage Prevention Enforcement
14 Board is established in the Department of Energy and Environment.

15 (b)(1) The board shall consist of the following members:

16 (A) A commissioner of the Arkansas Public Service
17 Commission or his or her designee;

18 (B) The Attorney General or his or her designee, if the
19 designee is an attorney licensed to practice law in this state;

20 (C) An individual who is a representative of One Call
21 Center, appointed by the Governor;

22 (D) An individual who is a representative of a natural gas
23 utility that is serving customers in Arkansas, appointed by the Governor;

24 (E) An individual who is a representative of a business or
25 association engaged in locating underground facilities, appointed by the
26 Governor;

27 (F) An individual who is a representative of the Arkansas
28 Rural Water Association, appointed by the Governor;

29 (G) An individual who is a representative of the Arkansas
30 Municipal League, appointed by the Governor;

31 (H) Three (3) individuals who are representatives of the
32 Arkansas Chapter of the Associated General Contractors of America;

33 (I) An individual who is a representative of an electric
34 utility serving customers in Arkansas, appointed by the Governor;

35 (J) An individual who is a representative of a water
36 utility serving customers in Arkansas, appointed by the Governor; and

1 (K) An individual who is a representative of a cable
2 telecommunications provider, appointed by the Governor.

3 (2) Members shall have expertise with the operation of this
4 chapter.

5 (c)(1) A member who is appointed by the Governor shall serve for a
6 term of two (2) years.

7 (2) The initial terms of members shall be staggered as
8 determined by the Governor so that some members shall have an initial term of
9 one (1) year.

10 (3) At the end of the term, a member continues to serve until a
11 successor is appointed and qualifies under this chapter.

12 (4)(A) A vacancy shall be filled in the same manner as the
13 original appointment.

14 (B) The new appointee shall serve for the remainder of the
15 unexpired term.

16 (d)(1) The Governor shall fill any vacancy in the membership of the
17 board within sixty (60) days of the vacancy, if possible.

18 (2) On the recommendation of the board, the Governor may remove
19 and replace a member for incompetence or misconduct.

20 (e) A majority of the voting members constitutes a quorum for the
21 transaction of business before the board.

22 (f)(1) The Attorney General or his or her designee shall call the
23 first meeting of the board in Little Rock, Arkansas, no later than thirty
24 (30) days after the appointment of a majority of the members of the board.

25 (2) At the first meeting of the board, a majority of the voting
26 members shall elect a member to serve as the Chair of the Arkansas
27 Underground Facilities Damage Prevention Enforcement Board.

28 (g) Members shall serve without compensation.

29
30 14-271-117. Arkansas Underground Facilities Damage Prevention
31 Enforcement Board – Powers, authority, duties.

32 (a) The Arkansas Underground Facilities Damage Prevention Enforcement
33 Board may:

34 (1) Adopt rules for the conducting of board business and
35 proceedings;

36 (2) Adopt a seal;

1 (3) Maintain an office at a place designated by the board for
2 business and proceedings, including meetings;

3 (4) Maintain facilities for the purpose of holding hearings
4 under this chapter;

5 (5) Employ a staff;

6 (6) Accept a grant, loan, or any other assistance in any form
7 from any public or private source, except state appropriations, subject to
8 this chapter;

9 (7) Oversee the development of or contract for the development
10 of an underground facility damage prevention training program in consultation
11 with the Pipeline Safety Division of the Arkansas Public Service Commission
12 and the One Call Center;

13 (8) Enter into contracts and execute the instruments necessary
14 or convenient to carry out and implement this chapter;

15 (9) Issue subpoenas; and

16 (10) Conduct all things necessary or convenient to carry out the
17 powers expressly granted by this chapter.

18 (b) The board shall:

19 (1)(A) Develop and adopt no later than January 1, 2022, rules
20 concerning a tiered penalty structure.

21 (B)(i)(a) Establish a tiered penalty structure.

22 (b) The tiered penalty structure described in
23 subdivision (b)(1)(B)(i)(a) of this section shall be based on:

24 (1) The number of violations by the
25 person within a twelve-month period; and

26 (2) Other relevant factors as determined
27 by the board.

28 (ii)(a) For a first violation of this chapter, the
29 maximum penalty amount under the tiered penalty structure shall not exceed
30 two thousand five hundred dollars (\$2,500) for each violation.

31 (b) For subsequent violations of this chapter,
32 within a twelve-month period, the maximum penalty amount under the tiered
33 penalty structure shall not exceed fifty thousand dollars (\$50,000).

34 (C) Before adoption of the tiered penalty structure by the
35 board, the board may impose a penalty not to exceed two thousand five hundred
36 dollars (\$2,500) per violation.

1 (D) The board shall conduct administrative hearings
 2 according to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.;

3 (2) Hear and adjudicate complaints relating to violations of
 4 this chapter;

5 (3) Assess civil penalties for violations of this chapter;

6 (4) Require education for a person who violates this chapter as
 7 described in § 14-271-104; and

8 (5) Administer the Underground Facilities Damage Prevention Fund

9 (c) The board shall not accept any state appropriations.

10 (d) This chapter does not modify or repeal existing laws concerning
 11 the power or jurisdiction of the Arkansas Public Service Commission.

12
 13 14-271-118. Dispute resolution panel.

14 (a) The Arkansas Underground Facilities Damage Prevention Enforcement
 15 Board may form a dispute resolution panel and adopt rules to design a
 16 voluntary dispute resolution process that may be used by excavators, facility
 17 owners, designers, project owners, and other interested or involved persons.

18 (b)(1) The use of a dispute resolution panel administered by the board
 19 is voluntary.

20 (2) A dispute resolution panel has to be agreed upon by all
 21 interested parties.

22 (3) The findings of a dispute resolution panel is not binding.

23 (c) The dispute resolution panel may settle disputes arising from
 24 damage to underground facilities, including without limitation any cost or
 25 damage incurred by an owner, operator, or excavator as a result of any delay
 26 in the excavation project while the underground facility is restored.

27 (d) The dispute resolution panel shall not:

28 (1) Be used or resolve alleged complaints to the board; or

29 (2) Impact any issues related to the board's enforcement
 30 activities.

31
 32 14-271-119. Arkansas Underground Facilities Damage Prevention
 33 Enforcement Board – Enforcement.

34 The Arkansas Underground Facilities Damage Prevention Enforcement Board
 35 may:

36 (1) Initiate proceedings on complaints filed for violations of

1 this chapter under the Arkansas Administrative Procedure Act, § 25-15-201 et
 2 seq., and rules adopted by the board;

3 (2) After a hearing:

4 (A) Assess a civil penalty under § 14-271-104;

5 (B) Order operators of underground pipeline facilities and
 6 excavators to cease and desist any violation of 49 C.F.R. Part 198, Subpart
 7 C, as it existed on January 1, 2021, or of this chapter;

8 (C) Assess civil penalties for failure to comply with
 9 orders of the board up to two thousand five hundred dollars (\$2,500) per
 10 violation for a first violation in a twelve-month period; or

11 (D) Reach a settlement for violations under this chapter;

12 (3) Establish reasonable complaint filing fees and
 13 administrative fees for complaints heard by the board;

14 (4) Waive filing and administrative fees if the board determines
 15 that a party cannot afford to pay the fees; and

16 (5) Use the services of a third party to collect civil
 17 penalties.

18
 19 14-271-120. Hearings.

20 (a) In a hearing before the Arkansas Underground Facilities Damage
 21 Prevention Enforcement Board for an alleged violation of this chapter or 49
 22 C.F.R. Part 198, Subpart C, as it existed on January 1, 2021:

23 (1) Proceedings shall be conducted according to the Arkansas
 24 Administrative Procedure Act, § 25-15-201 et seq., and rules adopted by the
 25 board;

26 (2) All testimony shall be given under oath; and

27 (3) The proceedings shall be recorded and a transcript created
 28 at the expense of the board.

29 (b) The Chair of the Arkansas Underground Facilities Damage Prevention
 30 Enforcement Board or a hearing officer appointed by the chair may administer
 31 the oath.

32
 33 14-271-121. Funding – Underground Facilities Damage Prevention Fund.

34 (a) The Arkansas Underground Facilities Damage Prevention Enforcement
 35 Board may obtain funding for its operational expenses from:

36 (1) A federal or state grant;

1 (2) Filing fees and administrative fees for complaints heard by
2 the board;

3 (3) An additional assessment or charge per ticket as authorized
4 under subsection (b) of this section; and

5 (4) Any other source, except state appropriations.

6 (b)(1) By a two-thirds vote of all members of the board, the board may
7 assess the board's annual operating cost to member operators through a per-
8 ticket charge not to exceed five cents (5¢) collected by the One Call Center.

9 (2) The per-ticket charge shall be designed to recover the cost
10 of investigative, administrative, and legal services, and other costs
11 reasonably necessary to carry out the board's responsibilities under this
12 chapter.

13 (3) The annual operating costs of the board shall be determined
14 after deducting funds available from other sources, including without
15 limitation federal grants.

16 (c) Except as provided in subdivision (a)(2) and subsection (b) of
17 this section, the board shall not impose a charge or assessment against a
18 person, directly or indirectly, to obtain funding for its operation expenses.

19 (d)(1) The board shall establish an Underground Facilities Damage
20 Prevention Fund.

21 (2) All civil penalties collected under this chapter shall be
22 deposited into the fund.

23 (3) Any moneys remaining in the fund at the end of the fiscal
24 year shall not revert to the General Revenue Fund but shall remain in the
25 fund for the exclusive use of the board.

26 (4) The board shall administer the fund.

27 (5) The expenditures of moneys in the fund shall be at the
28 discretion of the board for the purposes of damage prevention, public
29 awareness, education, compliance programs, and compliance training.

30 (6) The fund shall not be used for operational expenses of the
31 fund.

32
33 14-271-122. Rules.

34 The Arkansas Underground Facilities Damage Prevention Enforcement Board
35 shall promulgate rules to implement the chapter.

36

SECTION 3. DO NOT CODIFY. Rules.

(a) When adopting the initial rules required under this act, the Arkansas Underground Facilities Damage Prevention Enforcement Board shall file the final rules with the Secretary of State for adoption under § 25-15-204(f):

(1) On or before January 1, 2022; or

(2) If approval under § 10-3-309 has not occurred by January 1, 2022, as soon as practicable after approval under § 10-3-309.

(b) The board shall file the proposed rules with the Legislative Council under § 10-3-309(c) sufficiently in advance of January 1, 2022, so that the Legislative Council may consider the rules for approval before January 1, 2022.

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