

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
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As Engrossed: H3/4/21 H3/10/21
A Bill

HOUSE BILL 1364

By: Representatives Pilkington, *Underwood*

By: Senator L. Eads

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS UNDERGROUND FACILITIES
DAMAGE PREVENTION ACT; TO CREATE THE ARKANSAS
UNDERGROUND FACILITIES DAMAGE PREVENTION ENFORCEMENT
BOARD; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE ARKANSAS UNDERGROUND
FACILITIES DAMAGE PREVENTION ACT; AND TO
CREATE THE ARKANSAS UNDERGROUND
FACILITIES DAMAGE PREVENTION ENFORCEMENT
BOARD.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 14-271-104 is amended to read as follows:

14-271-104. ~~Penalties—Civil remedies~~ Civil penalties.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(H) Three (3) individuals who are representatives of the Arkansas Chapter of the Associated General Contractors of America, appointed by the Governor;

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

(J) An individual who is a representative of a water or

wastewater utility serving customers in Arkansas, appointed by the Governor;
and

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

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

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

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

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

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

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

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

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

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

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

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

(g) Members shall serve without compensation.

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

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

(1) Adopt rules for the conducting of board business and

proceedings;

(2) Adopt a seal;

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

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

(5) Employ a staff;

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

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

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

(9) Issue subpoenas; and

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

(b) The board shall:

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

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

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

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

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

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

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

(C) Before adoption of the tiered penalty structure by the

board, the board may impose a penalty not to exceed two thousand five hundred dollars (\$2,500) per violation.

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

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

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

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

(5) Administer the Underground Facilities Damage Prevention Fund

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

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

14-271-118. Dispute resolution panel.

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

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

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

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

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

(d) The dispute resolution panel shall not:

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

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

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

The Arkansas Underground Facilities Damage Prevention Enforcement Board

may:

(1) Initiate proceedings on complaints filed for violations of this chapter under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., and rules adopted by the board;

(2) After a hearing:

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

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

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

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

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

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

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

14-271-120. Hearings.

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

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

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

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

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

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

(a) The Arkansas Underground Facilities Damage Prevention Enforcement

Board may obtain funding for its operational expenses from:

- (1) A federal or state grant;
- (2) Filing fees and administrative fees for complaints heard by the board;
- (3) An additional assessment or charge per ticket as authorized under subsection (b) of this section; and
- (4) Any other source, except state appropriations.

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

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

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

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

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

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

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

(4) The board shall administer the fund.

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

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

14-271-122. Rules.

The Arkansas Underground Facilities Damage Prevention Enforcement Board

shall promulgate rules to implement the chapter.

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.

/s/Pilkington