



# **Nebraska Underground Safety Committee**

## **Penalty Schedule for violations of NEB§ 76-2301-76-2332 Nebraska One Call Act and Title 155 Chapter 2 & 3**

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## Purpose of this Document

This is a document to assist the Nebraska Underground Safety Committee in penalties under NEB§ 76-2301 – 76-2333 (Nebraska 811 Law). It provides general principles for recommending penalties. **However, it is not meant to hinder case-by-case decision-making by the Safety Committee based on specific facts of a case.**

The Nebraska 811 Law requires the Fire Marshal Agency to make findings of violations. The Underground Safety Committee reviews those findings and makes penalty determination.

## 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 Committee having the ability to consider a variety of factors that could increase or decrease the penalty.
- 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 the Committee.

## The Enforcement Process

- The enforcement process begins with a complaint of a violation of the Nebraska 811 Law. When a complaint is received by the Fire Marshal, it will send a letter to both parties: the excavator and utility to request more information if needed. Once evidence is gathered, the SFM will investigate the incident to find whether a violation of the Nebraska 811 Law has occurred.
- If the Division finds a violation, it sends a letter to both parties of the findings. A separate letter, along with SFM report and all evidence will be sent requesting enforcement, to the Underground Safety Committee for enforcement. The Underground Safety Committee reviews the evidence and finding of violation, then determines the appropriate penalty recommendation in accordance with this penalty schedule.
- The Underground Safety Committee will send the respondent a letter to notify them of the penalty and provided 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 and penalty, but must notify the SFM to request a hearing.
- If the respondent does not request a hearing, **The Final Order with the finding of violation and penalty will be sent to the violator and they will have 90 days after receiving the final order to comply with the order.**

## Definitions

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

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

**Person** -- Person means an individual, partnership, limited liability company, association, municipality, state, county, political subdivision, utility, joint venture, or corporation and shall include the employer, employee, or contractor of an individual.

**Professional Excavator** – Excavator shall mean a person who engages in excavation in this state that is listed with the Department of Labor.

# 1. Professional Excavators

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

Code	Description
NEB §76-2321(1)	Failure to provide notice of excavation (i.e., obtain a ticket/or maintain an active ticket.)
NEB §76-2321	Performing excavation or demolition prior to two working days from the ticket request date without all affected operators clearing or marking area.
Title 155 Chapter 2.005.03	Performing excavation or demolition after the expiration of the ticket. 17 days on a normal ticket. 14 days on a refresh.
NEB § 76-2321	Performing excavation outside of the requested locate area described in the normal ticket.
Title 155 Chapter 2 005.04	Failure to maintain clearance of tolerance zone with mechanized equipment
NEB § 76-2323	Failure to dig within the 17-day time frame for a normal ticket or 14 day time frame of a refresh ticket.
NEB § 76-2326	Failure to report a damage to the center. Excavator shall not attempt to conceal or repair damaged utility.
NEB § 76-2331	No excavation shall be performed within twenty-five feet of an underground natural gas line as defined in 49C.F.R 192.3 with out representation from the pipeline operator or have an agreement that must be in writing.

## 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 Committee'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 Committee's Final Order.
Third violation	\$3,000 civil penalty
Fourth or more violations	Civil penalties escalate by \$500 for every damage that occurs up to \$10,000 for gas and fiber. All other utilities up to \$5,000

- 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 NEB §76-2321(1)**

Any professional excavator that does not have an active ticket during excavation will be subject to the penalty schedule below.

First violation	Training (converts to a \$5,000 civil penalty if training is not completed within 90 days from the date of the Committee'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 Committee May Consider Escalating Penalties for Violations by Professional Excavators NEB §76-2326**

The 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 for all other utilities **Penalties may be increased up to \$10,000(for gas and fiber)

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

- Failure to report the damage to Nebraska 811
- Failure to report release of gas or hazardous liquid to Nebraska 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 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 Committee Considers When Reducing Penalties for Professional Excavators**

The Committee may consider whatever factors it deems appropriate to reduce penalties. Generally, penalties will not be reduced simply because the respondents have 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 has or at the fourth violation level, whichever is lower.

## 2. Occupant Excavators

An occupant excavator, as determined by the 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), 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 Committee Considers to Escalate Penalties for Violations by Occupant Excavators

The 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 Committee deems appropriate

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

The 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 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 Mislocate or follow Title 155 Chapter NEB §76-2323.

Initial Violation Mislocating or failure to respond electronically	\$1,000 or lower, considering mitigating circumstances Per violation
Second or more violation for Mislocating or failure to respond electronically.	\$1,000 + considering mitigating circumstances per violation.

#### 3.2 Operators Who Fail to Locate NEB §76-2323.

Initial Violation for failure to Locate	\$1,500 or lower, considering mitigating circumstances.
Second Violations for failure to Locate	\$3,000 +considering mitigating circumstances
Third violations for failure to Locate	\$5,000 Max penalty per day violations exists.

#### 3.3 Aggravating Factors the Committee Considers Escalating Penalties for Violations by Operators

The 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 Committee deems appropriate

#### 3.4 Mitigating Factors That the 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 Committee deems appropriate.

### **3.5 Operators Who Fail to Join One Call System NEB § 76-2318**

Pursuant to), civil penalty for failing to join the association (Nebraska 811) is below with different timelines and maximum facilities.

Initial violation	Warning Letter
Failure to join within 1 months of the due date in the warning letter	\$500
Failure to join within 2 months of the due date in the warning letter	\$5,000 for all except Gas and Fiber
Failure to join within 2 months of the due date in the warning letter	\$10,000 Gas and fiber

## 4. Training

### 4.1 Mandated Training for Excavators

For the purposes of required training, to be “trained” means: (1) attending the instructor-led training, and (2) successfully passing the examination at the end of the instructor-led training. **Only instructors and instructor-led training approved by the State Fire Marshal will fulfill penalty requirements for penalties ordered by the Underground Safety Committee.**

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.

