

DRAFT HB 365 Implementation Rules

NEW RULE I DEFINITIONS For the purposes of this [chapter/part/sub-part], the following definitions apply:

(1) "Advisory council" means the underground facility protection advisory council provided for by 69-4-520, MCA.

(2) "Call center" means a notification center, as defined in 60-4-501, MCA, that serves a designated geographical region of Montana for purposes of allowing excavators to obtain the location of underground facilities in the location where an excavation is proposed to occur. A call center is also known as a "call before you dig" center, or an "811" center.

(3) "Department" means the department of labor and industry, as provided by 69-4-501, MCA.

(4) "Excavator" has the same meaning as provided by 69-4-501, MCA.

(5) "Incident" has the same meaning as provided by 69-4-501, MCA.

(6) "Underground facility owner" has the same meaning as provided by 69-4-501, MCA.

AUTH: 69-4-522, MCA.

IMP: 69-4-501, MCA.

NEW RULE II COLLECTION OF INCIDENT REPORTS (1) A call center must submit an incident report to the department within 30 days of learning of an incident.

(2) The department shall accept incident reports submitted by a call center:

(a) on a department-approved reporting form:

(i) via U.S. Mail to Underground Facility Protection Program, PO Box 200517, Helena, MT 59620-0517; or

(ii) via fax to 406.841.2050; or

(b) electronically,

(i) via e-mail to buildingcodes@mt.gov; or

(ii) via the internet to the department's website at <http://ebiz.mt.gov>.

AUTH: 69-4-522, MCA.

IMP: 69-4-522, 69-4-529, MCA.

NEW RULE III ASSESSMENT AND COLLECTION OF CIVIL PENALTIES

(1) In order to determine when the last 100 locate requests were made, or the number of locate requests made in the past 12 months, the department shall contact each call center serving Montana to obtain that information. Each call center shall provide the requested information within seven days of the department's request.

(2) In order to timely issue civil penalties as required by 69-4-524 and 69-4-525, MCA, if both call centers to not respond within 10 days of a request, the department

may issue a civil penalty based solely on the number of locate requests identified by the call center in which the event or incident occurred.

(a) For good cause shown, a party to whom a civil penalty has been issued pursuant to subsection (2) may seek a recalculation of the penalty based on information received from both call centers.

(b) The department may withdraw a civil penalty if it is timely notified by the underground facility owner, pursuant to 69-4-529, MCA, the civil penalty is not required.

(3) A party aggrieved by the imposition of a civil penalty may contest the penalty as provided for in [NEW RULE VI].

(4) A civil penalty that has not been contested and which remains unpaid for more than 75 days after it was issued may be referred by the department for collection of the debt.

AUTH: 69-4-522, MCA.

IMP: 69-4-522, 69-4-524, 69-4-525, 69-4-529, 69-4-530, MCA.

NEW RULE IV COLLECTION OF FINES (1) The department shall, as required by 69-4-529, MCA, assess a fine of \$100 on an underground facility owner for each report the underground facility owner fails to timely file.

(2) A party aggrieved by the imposition of a fine may contest the fine as provided for in [NEW RULE VI].

(3) A fine that has not been contested and which remains unpaid for more than 75 days after it was issued may be referred by the department for collection of the debt.

AUTH: 69-4-522, MCA.

IMP: 69-4-522, 69-4-529, MCA.

NEW RULE V COLLECTION OF ANNUAL FEES (1) In order to collect the annual fees from underground facility owners, the department may, by contract or other agreement, have the annual billing performed by the call centers.

(2) An underground facility owner may receive a bill from any call center from which the underground facility owner has received locate requests.

(3) The annual fees must be paid by the underground facility owner within 30 days of the date of a bill for those fees.

(4) Annual fees which remain unpaid for more than 90 days after billing may be referred by the department for collection of the debt.

option:[(i) The department, in its sole discretion, may allow an underground facility owner that is billed an annual fee of less than **[\$xxx]** to defer the payment of the annual fees until the following year. An underground facility owner whose annual fee payment is deferred will not be referred to collection during the period of deferral.

(ii) The department may not allow a deferral of payment of annual fees more than once every two years.]

(5) The amount of the annual fee to be paid by an underground facility owner is \$0.10 per outgoing locate request made by each call center.

AUTH: 69-4-522, MCA.

IMP: 69-4-522, 69-4-530, MCA.

NEW RULE VI DISPUTES REGARDING PENALTIES AND FINES – MEDIATION (1) A party that timely disputes a civil penalty or fine may, after first satisfying the mediation requirements of this rule, have a contested case with the department. The contested case must be held in accordance with the Montana Administrative Procedure Act, and will be conducted by the department's office of administrative hearings.

(2) The underground facility protection advisory council shall act as the mediator of disputed civil penalties or fines. The mediator shall attempt to bring the parties to mutually acceptable resolution of the dispute.

(3) Mediation is a private, mandatory, informal, and non-binding proceeding. Statements made during the mediation process, and the recommendations of the mediator, are not admissible in any other proceeding, and may not be offered in evidence in any other proceeding.

(4) The department shall promptly notify the facility protection advisory council of disputes arising under 69-4-524, 69-4-525, or 69-4-529. The mediation must be conducted within 45 days of the council being notified.

(5) Mediation may be conducted by a majority of the council, or it may be delegated by the council to a subset of the council to act as the mediator.

(6) Mediation is conducted by telephone, unless the parties and the mediatory agree to in-person mediation, and the parties waive the 45 day requirement.

(7) The mediator shall issue a written report and recommendation to the parties within 15 days of the mediation.

(8) If the parties agree to a resolution of their dispute during mediation or within 20 days after the report and recommendation is sent to the parties, the department shall notify the council that the matter has been resolved.

(9) If the party that disputes the civil penalty or fine does not agree to resolve the matter, it must notify the department within 20 days of the mediation report and recommendation being issued that the department must schedule a contested case.

(10) Failure of a party to timely notify the department to schedule a contested case acts as waiver of the right to a contested case.

(11) Mediation conducted under this rule may be guided by, but is not bound by, the mediation procedures and rules applicable to workers' compensation matters, pursuant to Title 39, chapter 71, part 24, MCA, and ARM Title 24, chapter 28.

AUTH: 69-4-522, MCA

IMP: 69-4-526, 69-4-529, MCA

NEW RULE VII TRAINING AND EDUCATIONAL GRANTS (1) A call center that has received locate requests during the prior calendar year may apply for a training and educational grant.

(2) A grant application must be in writing:

(a) and must address the following topics:

(i) the name of applicant;

(ii) the number of locate requests received by the applicant in the prior calendar year;

(iii) a description of each specific educational or training programs that the applicant proposes to conduct;

(iv) the estimated cost or budget for each program identified in subsection (c); and

(v) a description of the audience each proposed program plans to target; and

(b) may provide such other information relevant to the applicant's existing or proposed programs, and should include an explanation of how the proposed programs will promote public safety with regards to underground facilities.

(3) A call center may submit only one grant application per year. The department will accept and review grant applications every six months, starting January 1, 2019.

(4) Grants are awarded annually on state fiscal year basis. The amount available for distribution is dependent upon the balance in the grant account that exists on January 1 of the year in which the application is made.

(5) Grants will be awarded to call centers on an equitable basis, based upon the number of locate requests made in the prior year to all applicants. The equitable allocation may be affected by projected changes in the expected number of locate requests likely to occur during the next year.

(6) The department shall consult with the advisory council in determining how to distribute available grant funding, in light of the applications received. In making the grant distribution, the department will consider:

(a) whether the applicant has timely made reports as required by [NEW RULE VIII];

(b) the apparent effectiveness of the applicant's previous and existing educational and training programs, as judged by the frequency of incidents reported by the call center versus the number of locate requests made;

(c) whether the proposed programs integrate or coordinate with similar programs operated or proposed by other applicants;

(d) any trends or patterns of excavation activity that tend to show the need for a geographically targeted program to reach excavators and the public; and

(e) any other factors that the call center deems relevant to the grant application.

AUTH: 69-4-522, MCA.

IMP: 69-4-522, 69-4-528, MCA.

NEW RULE VIII REPORTS BY GRANT RECIPIENTS (1) The department will provide each grant recipient a report form, which may be electronic, upon which the grant recipient shall report:

(a) the amount of the actual expenditures of the grant funds;
(b) the details of what the expenditures were made, such as the number of signs printed, the number of public service announcements produced, or the type and number of advertisements purchased; and

(c) the perceived effectiveness of the materials or projects funded via the grant.

(2) The grant recipient is encouraged, but not required, to provide information to the department regarding:

(a) any problems encountered in conducting the grant-funded program;

(b) any recommendations on how to improve the grant-making process or programs implemented under a grant;

(c) any suggestions as how to improve or better promote the "call before you dig" program; and

(d) any suggestions as how to improve or better provide public information regarding underground facilities.

(3) The report must be sent to the department [within 12 months of the date the grant was awarded].

AUTH: 69-4-522, MCA.

IMP: 69-4-522, 69-4-528, MCA.

Fee impact analysis: Based on information provided by the proponents of HB 365, the department estimates that annual fees charged pursuant to NEW RULE V, at \$0.10 per "locate" request, will total approximately \$60,000 to \$66,000 per year. The annual fees will fund the department's operation and administration of the underground facility program.

The department is unable to estimate the annual income arising from civil penalties issued pursuant to NEW RULE III. There is no existing database upon which project the number of instances that will give rise to a civil penalty, nor to estimate the amount of the penalties, which escalate with subsequent incidents. The department anticipates that the majority of civil penalties will be incurred by excavators, with a lesser amount from underground facility owners. The department has no basis upon which to estimate the number of persons who may qualify as an "excavator" and who potentially subject to a civil penalty. The department, based on information provided by the proponents of HB 365, estimates that there are approximately 700 entities that are the owner of underground facilities. Likewise, there is no basis upon which to estimate the amount that is likely to generated from fines levied pursuant to NEW RULE IV. Fines are levied only against underground facility owners. The department notes that the income from all civil penalties and fines must be paid out annually as grants to call centers operating in Montana, as provided by statute. Presently, there are two call centers operating in Montana.