

Chapter 9: Legal and Liability Issues

Although this chapter may be used as a guideline for legal and liability issues, it is recommended you contact your local County Counsel on these matters.

RISK MANAGEMENT

Every effort should be made to minimize the potential for injury, damage or loss in all aspects of district operation; however, accidents can occur and questions of liability may arise. SWCDs are subject to the protections of the Indiana Tort Claims Act (IC 34-13- 3). Anyone who has a claim for personal injury or property damage against the State of Indiana and its political subdivisions must file a claim that complies with IC 34-13-3. A liability insurance policy, such as the one provided by the IASWCD may also be in effect.

Sec. 1 Tort Law

Indiana Tort Claims Act The Indiana Tort Claims (IC 34-13-3) may provide a defense to tort claims or suits brought against the SWCD under the Act, district supervisors, or employees acting within the scope of their employment are not liable for losses resulting from a variety of causes, nor is the district liable for punitive damages. The Governor may compromise or settle a claim/suit brought against the district. The Attorney General advises the Governor concerning the desirability of such compromise or settlement and provides for the defense of the district.

Under the terms of the Indiana Tort Claims Act, a claim against a district is barred unless official notice is filed with the Attorney General within 180 or 270 days (depending on the unit of government involved) after a loss occurs. *Any district involved in an incident that might lead to a claim should inform the potential claimant of the filing requirements.*

Federal Tort Claims Act

The Federal Tort Claims Act may provide liability protection against claims arising from professional errors or automotive accidents involving Natural Resources Conservation Service (NRCS) vehicles on official government business by SWCD employees. For up-to-date information and guidelines, please contact NRCS.

Initiating a Claim

1. When a district learns that a liability claim may be filed supervisors should immediately contact their ISDA District Support Specialist and the IASWCD.
2. Under the terms of the Indiana Tort Claims Act, a claim against a district is barred unless official notice is filed with the Attorney General within 180 or 270 days (depending on what type of government entity is involved) after a loss occurs. *Any district involved in an incident that might lead to a claim should inform the potential claimant of the filing requirements.*

3. The Notice-of-Tort-Claim Form <https://forms.in.gov/Download.aspx?id=9840> must be filed both with the district and with the Attorney General. It must describe in clear, concise language the facts upon which the claim is based.
4. If the claim is denied by the Attorney General, the claim may then be filed with any secondary insurance the SWCD may carry.
5. If it is determined that the loss is not covered under the Indiana Tort Claims Act or the Federal Tort Claims Act with NRCS, the SWCD should contact its secondary insurance agent and provide the required information. Information may include:
 - a. Insured's name and address.
 - b. Special multi-peril policy number (65-7-1065708)
 - c. Date and time of accident or incident.
 - d. Nature and location of accident or incident.
 - e. Claimant's name, address, and telephone number.
 - f. Name of law enforcement agency which did the investigation, if applicable.
 - g. Estimate of damaged equipment.
6. In case of questions during the claim process, contact your District Support Specialist, the IASWCD, and the servicing agent of the insurance carrier to inform all parties of the nature of the problem.

Sec. 2 Insurance Issues

ROUTINE EVENT LIABILITY COVERAGE

Secondary liability insurance is carried by IASWCD for routine SWCD activities and events such as field days, pond clinics, education events, trainings and other similar activities. It is to be noted that any transportation within an event (such as hay ride style, conveyance) is not currently covered under the policy. The SWCD should be familiar with the current policy coverage and its limitations. Contact the IASWCD for details of current policy coverage.

SPECIAL EVENT COVERAGE

Many events sponsored by the SWCD are beyond what is considered to be routine SWCD events. Examples of events considered to be non-routine SWCD events include but are not limited to:

- River rafting
- Airplane tours of farms and properties
- Forestry field days where chainsaw demonstrations are given to fell trees and do timber stand improvement

If such an event is planned, it is recommended that an SWCD obtain specific event insurance for the event. (Contact IASWCD if more information is needed on specific insurance needs.)

INSURING DISTRICT PROPERTY

SWCD equipment, vehicles, buildings (including storage buildings and garages), land or other property is not covered by any blanket insurance policy held by IASWCD or any other agency. Districts must plan to carry individual policies to assure that coverage exists. In some instances agreements may be developed with one's county for coverage under blanket, county owned policies; however, this is to be done on an individual basis. County/SWCD relationships vary throughout the state and not all counties permit SWCDs on county policies.

Sec. 3 Equipment Leasing

Many districts own or lease conservation equipment to be used by clients. It is important to assure that a liability waiver form is utilized each time a piece of equipment is rented/leased; and clients read, understand the provisions of the form and sign it prior to using equipment.

Clients must have vehicle insurance. In the case of SWCD conservation equipment pulled by a client's vehicle, the (equipment) liability is assumed by the insurance coverage of the towing vehicle.

A copy of the signed agreement should be provided to the client and the original should be filed in the SWCD office.

The sample form is on the following page and may be duplicated for District use. Districts should run any forms by their County Attorney.

EQUIPMENT LEASE/RENTAL LIABILITY WAIVER FORM

_____ County Soil and Water Conservation District

Address: _____

City / State / Zip: _____

Telephone number: _____

Prior to taking District owned equipment into your possession, this form must be completed and returned to the District for approval. I, _____, anticipate leasing the District's _____ for the following purpose to _____ on _____ acres. I anticipate picking-up the equipment on _____ and returning it on _____.

I understand that I am responsible for this equipment while it is in my care, custody, and control. I confirm that Insurance is current on the vehicle towing the equipment. I also understand that I am responsible for the following:

- to perform an inspection of the equipment for damage prior to taking it into my possession and to report any damage to the District office immediately;
- to immediately contact the district when I pick up and return the equipment;
- to report the number of acres actually covered to the District when I return the equipment;
- to assume responsibility for any repairs due to my negligence or use, excluding ordinary wear and tear, while the equipment is in my possession;
- to be responsible for the transport of the equipment from a previous job, or to and from the District parking lot; and,
- to provide payment of the District at the rate of \$ _____ per acre within _____ days of the billing.

The following customer information is requested:

Name: _____ Telephone: _____

Address: _____ City/State/Zip: _____

Date requested: _____ Customer Signature: _____

The above information was reviewed and approved by _____,
District representative, on _____.

Dates equipment actually picked up and used: _____ to _____. Acres covered _____

Additional insurance information for districts to consider

An SWCD may require participants in events to sign a liability release form to participate in events. Extension has this provision in some of its events.

In the event a vendor or sponsor put on an event on the SWCD's behalf, it is best for the SWCD to obtain a "Certificate of Insurance" from the group naming the SWCD as an 'additional insured' on the policy. This move proves that the group has liability insurance and to be named on the policy adds a very important layer of insurance for the SWCD.

Vehicle use: A number of SWCDs own vehicles. It is important to assure that adequate insurance is maintained on district owned vehicles. In the event the county will not provide insurance under its blanket vehicle policy, it is necessary to carry an independent policy of insurance. Some districts utilize NRCS vehicles and motorized equipment. It is necessary to comply with the provisions of NRCS when utilizing their equipment.

Professional liability would be a separate policy to purchase for interested SWCDs, as would be a Directors and Officers policy.

Sec. 4 Reporting, Retention, and Disposal of Records

Chapter 6, entitled “Receiving, Managing, and Disbursing Funds” (section 7), and Chapter 7 (section 3) both discuss records retention and disposal rules in more detail. The following reiterates the basics:

Records of an SWCD are official documents and must be maintained for a period of time which is determined by law. IC 5-15-1-1 states that these records must be protected; IC 5-15-6-1 further states that a local public records commission is to be established in each county. IC 5-15-6-2.5(b) concerning destruction of public records, states in part: “All requests to destroy, transfer, or otherwise dispose of records that are not covered by an approved retention schedule are to be submitted to the county commission and administration according to the procedure established under this chapter.”

If you wish to dispose of records not included on the retention schedule, you must contact the County Records Commission. The Clerk (or Recorder) of the Circuit Court serves as the Commission Secretary.

Sec. 5 Open Door Law

SWCD meetings are governed by the Indiana Open Door Law (IC 5-14-1.5) and are to be public meetings which allow for the public to attend and observe official actions on public business conducted by the SWCD. 48 hours notice is required.

In addition to the law citation, the Public Access Counselor publishes the Handbook on Indiana’s Public Access Laws to better explain the elements of this law. The website is: <https://www.in.gov/pac/files/PAC-Handbook-2017.pdf>.

Sec. 6 Nepotism

Nepotism is the practice among those with power or influence of favoring relatives or friends, especially by giving them jobs (source: Oxford Dictionary). Employment by public agencies generally excludes the employment of relatives. The nepotism law for local units of government is IC 36-1-20.2.

Chapter 36 (Indiana Code 36-1-20.2-2) Individuals employed on July 1, 2012

An individual who is employed by a unit on July 1, 2012, is not subject to this chapter unless the individual has a break in employment with the unit. The following are not considered a break in employment with the unit: (1) The individual is absent from the workplace while on paid or unpaid leave, including vacation, sick, or family medical leave, or worker's compensation. (2) The individual's employment with the unit is terminated followed by immediate reemployment by the unit, without loss of payroll time.

Chapter 36 (Indiana Code 36-1-20.2-8) “Relatives”

As used in this chapter, "relative" means any of the following: a spouse, a parent or stepparent, a child or stepchild, a brother, sister, stepbrother, or stepsister, a niece or nephew, an aunt or uncle, a daughter-in-law or son-in-law. For purposes of this section, an adopted child of an individual is treated as a natural child of the individual. For purposes of this section, the terms "brother" and "sister" include a brother or sister by the half blood.

Chapter 36 (Indiana Code 36-1-20.2-9) Adoption of more stringent or detailed requirements This chapter establishes minimum requirements regarding employment of relatives. The legislative body of the unit shall adopt a policy that includes, at a minimum, the requirements set forth in this chapter. However, the policy may: (1) include requirements that are more stringent or detailed than any provision in this chapter; and (2) apply to individuals who are exempted or excluded from the application of this chapter.

Therefore, it is important SWCDs also check with their local county to see if any additional policy has been developed regarding the employment of relatives.

Sec. 7 Dual Office Holdings

The Indiana Constitution prohibits public officials from holding two lucrative offices, referred to as dual office holding. The Indiana Attorney General has released a guide on dual office holding titled "Dual Office Holding Guide" available at <https://www.in.gov/attorneygeneral/files/DOH-Guide-2019-Update.pdf>.

Dual office holding violations are very fact specific. Any public official who is considering accepting a second government position is encouraged to consult with an attorney to ensure compliance with the Indiana Constitution and related laws. By accepting a second position in violation of this provision, an official effectively vacates their first lucrative position.

While there is no official legal opinion concerning SWCD supervisors, based on other precedent it is likely that this position would be considered a lucrative public office. The definition of a lucrative office is one in which the person is authorized to exercise some sovereign powers of the State and the person is entitled to receive compensation for these activities. Refusing the compensation does not render the position non-lucrative.

The SWCD should inform anyone who is currently a Supervisor or is considering appointment or election for SWCD Supervisor about the "Dual Office Holding Guide" and further to encourage them to seek legal advice from the Attorney General's office if they have questions about its implications on the office of SWCD Supervisor. Please keep in mind that serving as an Associate Supervisor would not be considered a "lucrative" position and consider offering that alternative to an individual who would like to serve the district but may be impacted by the Dual Office Holding prohibition.

Sec. 8 Conflict of Interest

A Conflict of Interest arises when a public official knowingly or intentionally has a pecuniary interest in or derives a profit from a contract or purchase made by the public entity for which the official serves. A pecuniary interest is any interest in a contract or purchase which will result (or is intended to result) in an increase in the net worth of a public official or the spouse or dependent of a public official.

SWCD supervisors and staff occasionally have goods or services they provide in their ordinary course of business which may be related to SWCD activities. It is crucial that any SWCD supervisor or staff person seeking to provide services or goods to those benefitting from SWCD activities disclose such situations promptly.

Citation on conflict of interest: IC 35-44.1-1 To view the text as well as the required form visit: <https://www.in.gov/isda/files/conflict-of-interest-2018.pdf>. Form 236 (disclosure statement) is available at: <https://www.in.gov/isda/files/conflict-of-interest-2018.pdf>.

Sec. 9 Non-discrimination It is the policy of Soil and Water Conservation Districts to serve all clients without regard to race, religion, color, sex, disability, national origin or ancestry as required by the Indiana Civil Rights Law (I.C. 22-9-1), Title VI and VII (Civil Rights Act of 1964), and the Americans with Disabilities Act (42 USCS §12101, et. seq.).

Sec. 10 ADA Guidelines

The Americans with Disabilities Act (ADA), passed in 1990, and as amended in 2008, prohibits discrimination against people with disabilities in employment and public services, public and private transportation, public accommodations and telecommunication services. Title II of the ADA applies to all State and local units of government, including SWCDs. Additionally, IC 5-14-1.5-8 requires that public meetings be held in a location that is accessible to individuals with a disability.

For specific regulations go to: <https://www.ada.gov/>

Sec. 11 Workplace Harassment

In 1986, the U.S. Supreme Court recognized sexual harassment as a form of illegal sex discrimination.

Sexual harassment is unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition or an individual's employment;

- Submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual;
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating and intimidating, hostile, or offensive working environment.

An employer has the legal responsibility to investigate sexual harassment complaints and to take appropriate actions to end the harassment and make sure it doesn't happen again.

To view Indiana Civil Rights Commission's Workplace Harassment guide, visit:
https://www.in.gov/icrc/files/Workplace_Harassment_New.pdf

Sec. 12 Ethics

Ethics rules apply to all levels of public employment. Public Officials are held to a higher standard of conduct than many private sector employees.

Ethics rules govern the use of public property and work time and prohibit use of publicly provided amenities for personal gain. Some prohibitions include:

- Not allowing for use of public supplies/equipment: telephone, fax machine, copy machine, vehicles, etc. for personal use.
- Assigning non-SWCD work to personnel.
- Political activity while on the job; or using employees to accomplish the same.
- Acceptance of gifts from those individuals or entities that have a business relationship with the SWCD
- 'Honoraria' – accepting payment for actions done on normally paid time

The Indiana State Ethics Commission website is: <http://www.in.gov/ig/>. The link has helpful information including publications, advice, and training information.

Sec. 13 EEO

Policies Federal Equal Employment Opportunity (EEO) Laws

What Are the Federal Laws Prohibiting Job Discrimination?

Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;

the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;

the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older; Title I and Title V of the Americans with Disabilities Act of

1990 (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;

Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government;

and the Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.

For more information visit: <http://www.eeoc.gov/facts/qanda.html>

Sec. 14 Charity Gaming Activities

Qualified not-for-profit organizations may conduct certain types of legal gaming activities in Indiana. These activities include bingo, raffles, door prizes, pull tab, punch board, tip board, and other games (card, wheel, dice, etc.). To qualify and conduct a legal gaming activity, an organization must be a bona fide religious, educational, senior citizen, veteran, political, or civic/fraternal/charitable organization operating within Indiana and must be exempt from taxation under Section 501 of the Internal Revenue Code. As of 1996, exemption from gross income tax no longer qualifies an organization.

SWCDs are local subdivisions of state government and therefore do not qualify to participate in gaming activities.

However, “midway-style” games are not regulated by Indiana’s charity gaming law. Examples of such games are: cranes (win what crane lifts) and games of skill (darts, basketball, water gun races, coin plate or ring toss, golfing, target shooting, etc.). Auctions (silent or live), which are the sale of items to the highest bidder, also are not regulated by the charity gaming law and do not require any type of license from the Indiana Department of Revenue.