

HOUSE BILL No. 1110

DIGEST OF INTRODUCED BILL

Citations Affected: IC 13-19-5-3; IC 34-6-2-38; IC 34-13-3-3.

Synopsis: Liability for inadequate drainage. Imposes liability on a governmental entity or an employee of a governmental entity for a loss that results from gross negligence, willful or wanton misconduct, or intentional misconduct in failing to provide adequate drainage from industrial or commercial sites.

Effective: July 1, 2009.

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January 8, 2009, read first time and referred to Committee on Rules and Legislative Procedures.

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First Regular Session 116th General Assembly (2009)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2008 Regular Session of the General Assembly.

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HOUSE BILL No. 1110



A BILL FOR AN ACT to amend the Indiana Code concerning civil procedure.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 13-19-5-3, AS AMENDED BY P.L.221-2007,
- 2 SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
- 3 JULY 1, 2009]: Sec. 3. (a) The authority shall do the following under
- 4 this chapter:
- 5 (1) Be responsible for the management of all aspects of the
- 6 program.
- 7 (2) Prepare and provide program information.
- 8 (3) Negotiate the negotiable aspects of each financial assistance
- 9 agreement and submit the agreement to the budget agency for
- 10 approval.
- 11 (4) Sign each financial assistance agreement.
- 12 (5) Review each proposed project and financial assistance
- 13 agreement to determine if the project meets the credit, economic,
- 14 or fiscal criteria established by guidelines of the authority.
- 15 (6) Periodically inspect or cause to be inspected projects to
- 16 determine compliance with this chapter.
- 17 (7) Conduct or cause to be conducted an evaluation concerning



- 1 the financial ability of a political subdivision to:
- 2 (A) pay a loan or other financial assistance and other
- 3 obligations evidencing loans or other financial assistance, if
- 4 required to be paid; and
- 5 (B) otherwise comply with terms of the financial assistance
- 6 agreement.
- 7 (8) Evaluate or cause to be evaluated the technical aspects of the
- 8 political subdivision's:
- 9 (A) environmental assessment of potential brownfield
- 10 properties;
- 11 (B) proposed remediation; and
- 12 (C) remediation activities conducted on brownfield properties.
- 13 (9) Inspect or cause to be inspected remediation activities
- 14 conducted under this chapter.
- 15 (10) Act as a liaison to the United States Environmental
- 16 Protection Agency regarding the program.
- 17 (11) Be a point of contact for political subdivisions concerning
- 18 questions about the program.
- 19 (12) Enter into memoranda of understanding, as necessary, with
- 20 the department and the budget agency concerning the
- 21 administration and management of the fund and the program.
- 22 (b) The authority may do the following under this chapter:
- 23 (1) Undertake activities to make private environmental insurance
- 24 products available to encourage and facilitate the cleanup and
- 25 redevelopment of brownfield properties.
- 26 (2) Enter into agreements with political subdivisions to manage
- 27 any of the following conducted on brownfield properties:
- 28 (A) Environmental assessment activities.
- 29 (B) Environmental remediation activities.
- 30 (c) The authority may:
- 31 (1) negotiate with;
- 32 (2) select; and
- 33 (3) contract with;
- 34 one (1) or more insurers to provide insurance products as described in
- 35 subsection (b)(1).
- 36 (d) Notwithstanding IC 13-23, IC 13-24-1, and IC 13-25-4, the
- 37 authority is not liable for any contamination addressed by the authority
- 38 under an agreement under subsection (b)(2) unless existing
- 39 contamination on the brownfield is exacerbated due to gross negligence
- 40 or intentional misconduct by the authority.
- 41 (e) For purposes of subsection (d), reckless, willful, or wanton
- 42 misconduct constitutes gross negligence.

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1 (f) The authority is entitled to the same governmental immunity
2 afforded a political subdivision under ~~IC 34-13-3-3(23)~~
3 **IC 34-13-3-3(a)(23)** for any act taken to investigate or remediate
4 hazardous substances, petroleum, or other pollutants associated with a
5 brownfield under an agreement under subsection (b)(2).

6 SECTION 2. IC 34-6-2-38, AS AMENDED BY P.L.1-2007,
7 SECTION 223, IS AMENDED TO READ AS FOLLOWS
8 [EFFECTIVE JULY 1, 2009]: Sec. 38. (a) "Employee" and "public
9 employee", for purposes of section 91 of this chapter, IC 34-13-2,
10 IC 34-13-3, IC 34-13-4, and IC 34-30-14, mean a person presently or
11 formerly acting on behalf of a governmental entity, whether
12 temporarily or permanently or with or without compensation, including
13 members of boards, committees, commissions, authorities, and other
14 instrumentalities of governmental entities, volunteer firefighters (as
15 defined in IC 36-8-12-2), and elected public officials.

16 (b) The term also includes attorneys at law whether employed by the
17 governmental entity as employees or independent contractors and
18 physicians licensed under IC 25-22.5 and optometrists who provide
19 medical or optical care to confined offenders (as defined in IC 11-8-1)
20 within the course of their employment by or contractual relationship
21 with the department of correction. However, the term does not include:

- 22 (1) an independent contractor (other than an attorney at law, a
- 23 physician, or an optometrist described in this section);
- 24 (2) an agent or employee of an independent contractor;
- 25 (3) a person appointed by the governor to an honorary advisory or
- 26 honorary military position; or
- 27 (4) a physician licensed under IC 25-22.5 with regard to a claim
- 28 against the physician for an act or omission occurring or allegedly
- 29 occurring in the physician's capacity as an employee of a hospital.

30 (c) A physician licensed under IC 25-22.5 who is an employee of a
31 governmental entity (as defined in section 49 of this chapter) shall be
32 considered a public employee for purposes of ~~IC 34-13-3-3(21)~~.
33 **IC 34-13-3-3(a)(21)**.

34 (d) For purposes of IC 34-13-3 and IC 34-13-4, the term includes a
35 person that engages in an act or omission before July 1, 2004, in the
36 person's capacity as:

- 37 (1) a contractor under IC 6-1.1-4-32 (repealed);
- 38 (2) an employee acting within the scope of the employee's duties
- 39 for a contractor under IC 6-1.1-4-32 (repealed);
- 40 (3) a subcontractor of the contractor under IC 6-1.1-4-32
- 41 (repealed) that is acting within the scope of the subcontractor's
- 42 duties; or

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- 1 (4) an employee of a subcontractor described in subdivision (3)
- 2 that is acting within the scope of the employee's duties.
- 3 SECTION 3. IC 34-13-3-3, AS AMENDED BY P.L.47-2006,
- 4 SECTION 48, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
- 5 JULY 1, 2009]: Sec. 3. **(a) Except as provided in subsection (b)**, a
- 6 governmental entity or an employee acting within the scope of the
- 7 employee's employment is not liable if a loss results from the
- 8 following:
- 9 (1) The natural condition of unimproved property.
- 10 (2) The condition of a reservoir, dam, canal, conduit, drain, or
- 11 similar structure when used by a person for a purpose that is not
- 12 foreseeable.
- 13 (3) The temporary condition of a public thoroughfare or extreme
- 14 sport area that results from weather.
- 15 (4) The condition of an unpaved road, trail, or footpath, the
- 16 purpose of which is to provide access to a recreation or scenic
- 17 area.
- 18 (5) The design, construction, control, operation, or normal
- 19 condition of an extreme sport area, if all entrances to the extreme
- 20 sport area are marked with:
- 21 (A) a set of rules governing the use of the extreme sport area;
- 22 (B) a warning concerning the hazards and dangers associated
- 23 with the use of the extreme sport area; and
- 24 (C) a statement that the extreme sport area may be used only
- 25 by persons operating extreme sport equipment.
- 26 This subdivision shall not be construed to relieve a governmental
- 27 entity from liability for the continuing duty to maintain extreme
- 28 sports areas in a reasonably safe condition.
- 29 (6) The initiation of a judicial or an administrative proceeding.
- 30 (7) The performance of a discretionary function; however, the
- 31 provision of medical or optical care as provided in IC 34-6-2-38
- 32 shall be considered as a ministerial act.
- 33 (8) The adoption and enforcement of or failure to adopt or enforce
- 34 a law (including rules and regulations), unless the act of
- 35 enforcement constitutes false arrest or false imprisonment.
- 36 (9) An act or omission performed in good faith and without
- 37 malice under the apparent authority of a statute which is invalid
- 38 if the employee would not have been liable had the statute been
- 39 valid.
- 40 (10) The act or omission of anyone other than the governmental
- 41 entity or the governmental entity's employee.
- 42 (11) The issuance, denial, suspension, or revocation of, or failure

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- 1 or refusal to issue, deny, suspend, or revoke any permit, license,
 2 certificate, approval, order, or similar authorization, where the
 3 authority is discretionary under the law.
- 4 (12) Failure to make an inspection, or making an inadequate or
 5 negligent inspection, of any property, other than the property of
 6 a governmental entity, to determine whether the property
 7 complied with or violates any law or contains a hazard to health
 8 or safety.
- 9 (13) Entry upon any property where the entry is expressly or
 10 impliedly authorized by law.
- 11 (14) Misrepresentation if unintentional.
- 12 (15) Theft by another person of money in the employee's official
 13 custody, unless the loss was sustained because of the employee's
 14 own negligent or wrongful act or omission.
- 15 (16) Injury to the property of a person under the jurisdiction and
 16 control of the department of correction if the person has not
 17 exhausted the administrative remedies and procedures provided
 18 by section 7 of this chapter.
- 19 (17) Injury to the person or property of a person under supervision
 20 of a governmental entity and who is:
- 21 (A) on probation; or
- 22 (B) assigned to an alcohol and drug services program under
 23 IC 12-23, a minimum security release program under
 24 IC 11-10-8, a pretrial conditional release program under
 25 IC 35-33-8, or a community corrections program under
 26 IC 11-12.
- 27 (18) Design of a highway (as defined in IC 9-13-2-73), toll road
 28 project (as defined in IC 8-15-2-4(4)), tollway (as defined in
 29 IC 8-15-3-7), or project (as defined in IC 8-15.7-2-14) if the
 30 claimed loss occurs at least twenty (20) years after the public
 31 highway, toll road project, tollway, or project was designed or
 32 substantially redesigned; except that this subdivision shall not be
 33 construed to relieve a responsible governmental entity from the
 34 continuing duty to provide and maintain public highways in a
 35 reasonably safe condition.
- 36 (19) Development, adoption, implementation, operation,
 37 maintenance, or use of an enhanced emergency communication
 38 system.
- 39 (20) Injury to a student or a student's property by an employee of
 40 a school corporation if the employee is acting reasonably under a
 41 discipline policy adopted under IC 20-33-8-7(b).
- 42 (21) An error resulting from or caused by a failure to recognize

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1 the year 1999, 2000, or a subsequent year, including an incorrect
 2 date or incorrect mechanical or electronic interpretation of a date,
 3 that is produced, calculated, or generated by:

- 4 (A) a computer;
- 5 (B) an information system; or
- 6 (C) equipment using microchips;

7 that is owned or operated by a governmental entity. However, this
 8 subdivision does not apply to acts or omissions amounting to
 9 gross negligence, willful or wanton misconduct, or intentional
 10 misconduct. For purposes of this subdivision, evidence of gross
 11 negligence may be established by a party by showing failure of a
 12 governmental entity to undertake an effort to review, analyze,
 13 remediate, and test its electronic information systems or by
 14 showing failure of a governmental entity to abate, upon notice, an
 15 electronic information system error that caused damage or loss.
 16 However, this subdivision expires June 30, 2003.

17 (22) An act or omission performed in good faith under the
 18 apparent authority of a court order described in IC 35-46-1-15.1
 19 that is invalid, including an arrest or imprisonment related to the
 20 enforcement of the court order, if the governmental entity or
 21 employee would not have been liable had the court order been
 22 valid.

23 (23) An act taken to investigate or remediate hazardous
 24 substances, petroleum, or other pollutants associated with a
 25 brownfield (as defined in IC 13-11-2-19.3) unless:

- 26 (A) the loss is a result of reckless conduct; or
- 27 (B) the governmental entity was responsible for the initial
 28 placement of the hazardous substances, petroleum, or other
 29 pollutants on the brownfield.

30 **(b) A governmental entity or an employee of a governmental**
 31 **entity acting within the scope of the employee's employment is**
 32 **liable for a loss resulting from the runoff or discharge of liquids:**

33 **(1) from real property that is:**

- 34 **(A) located within the boundaries of the governmental**
 35 **entity;**
- 36 **(B) owned by a person other than the person incurring the**
 37 **loss; and**
- 38 **(C) used for an industrial or a commercial purpose; and**

39 **(2) onto the surface of a road, a street, an alley, or another**
 40 **public way;**

41 **if the failure of the governmental entity or employee to provide**
 42 **adequate drainage for the liquids constitutes gross negligence,**

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1 **willful or wanton misconduct, or intentional misconduct.**
2 SECTION 4. [EFFECTIVE JULY 1, 2009] IC 34-13-3-3, as
3 amended by this act, applies only to causes of action arising after
4 June 30, 2009.

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