


INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	STATUS: Effective	POLICY NUMBER: Waste-0080-NPD	
AGENCY NONRULE POLICY DOCUMENT SUBJECT: Disclosure Statement Requirements for CFO Approval Applications	AUTHORIZED: Brian Rockensuess, Commissioner		
	SUPERSEDES: New	ISSUING OFFICE(S): Office of Land Quality, Permits Branch, CFO Permits Section	
	ORIGINALLY EFFECTIVE: Date Oct 14, 2022	RENEWED/REVISED: Date New	

Disclaimer: This nonrule policy document (NPD) is being established by the Indiana Department of Environmental Management (IDEM) consistent with its authority under IC 13-14-1-11.5. It is intended solely to provide guidance and shall be used in conjunction with applicable rules or laws. It does not replace applicable rules and laws, and if it conflicts with these rules or laws, the rules or laws shall control. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate State Environmental Board and may be put into effect by IDEM 30 days afterward. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. IDEM also will submit the policy to the Indiana Register for publication.

1.0 PURPOSE

The purpose of this nonrule policy document (NPD) is to provide clarity and consistency by setting forth IDEM's interpretation of the disclosure statement requirements for confined feeding operation (CFO) applications for approval to construct, expand, or operate (CFO application) under Indiana Code (IC) 13-18-10-1.4 (Disclosure Law).

2.0 SCOPE

This NPD applies to the disclosure statement process under IC 13-18-10-1.4 for approval of CFO applications. It applies to applicants seeking approval of a CFO application, the applicant's responsible parties, the applicant's consultants, and IDEM Office of Land Quality's (OLQ's) Confined Feeding Operation Permits Section (CFO Permits Section).

3.0 SUMMARY

This NPD sets forth IDEM's interpretation of the following undefined statutory terms used in the Disclosure Law:

- "Senior management official" under IC 13-11-2-191(a).
- "Material violation" under IC 13-18-10-1.4.
- "Substantial endangerment" under IC 13-18-10-1.4.

This NPD also clarifies when a responsible party must complete a disclosure statement including past enforcement actions that are older than five years.

Lastly, this NPD explains IDEM's review process and emphasizes the responsibility the Disclosure Law places on applicants to properly complete disclosure statements. It is important for applicants to understand what the Disclosure Law requires, including identifying responsible parties and what alleged violations must be disclosed.

4.0 DEFINITIONS

- 4.1. "Agency" – The Indiana Department of Environmental Management (IDEM).
- 4.2. "Applicant" IC 13-11-2-8(a) – For purposes of IC 13-18-10 Confined Feeding Control law, refers to a person submitting a CFO application to IDEM under IC 13-18-10-2.

- 4.3. "Confined feeding operation (CFO)" IC 13-11-2-40 –
 - A. Any confined feeding of at least 300 cattle, 600 swine or sheep, 30,000 fowl, or 500 horses.
 - B. Any animal feeding operation electing to be subject to IC 13-18-10.
 - C. Any animal feeding operation causing a violation of (1) water pollution control laws, (2) any rules of the environmental rules board, or (3) IC 13-18-10.
- 4.4. "CFO Law" – Confined Feeding Control law IC 13-18-10.
- 4.5. "Disclosure Law" – IC 13-18-10-1.4 of the CFO Law governing disclosure statements for CFO applications.
- 4.6. "Nonrule policy" – The term assigned by the Indiana Department of Environmental Management (IDEM) to those policies identified in IC 13-14-1-11.5 as any policy that: A. Interprets, supplements, or implements a statute or rule; B. Has not been adopted in compliance with IC 4-22-2; C. Is not intended by IDEM to have the effect of law; and D. Does not apply solely to the internal IDEM organization (is not an administrative policy).
- 4.7. "Person" IC 13-11-2-158(b) – For purposes of IC 13-18-10, means an individual, a partnership, a copartnership, a firm, a company, a corporation, an association, a joint stock company, a trust, an estate, a political subdivision, a state agency, or other legal entity; or their legal representative, agent, or assigns.
- 4.8. "Responsible party" IC 13-11-2-191(a) – For purposes of IC 13-18-10 means:
 - A. An individual applicant.
 - B. An officer, corporation director, or senior management official of any of the following that is an applicant:
 - 1. Corporation.
 - 2. Partnership.
 - 3. Limited liability company.
 - 4. Business association.

5.0 ROLES

- 5.1. The OLQ assistant commissioner shall:
 - A. Make the final decision whether to deny a CFO application in accordance with IC 13-18-10-2.1.
- 5.2. The Confined Feeding Operation Permits Section chief shall:
 - A. Ensure IDEM permit managers and the IDEM senior environmental manager(s) are familiar with and properly apply the Disclosure Law and this nonrule policy.
 - B. Ensure disclosure statements are consistently reviewed.
 - C. Determine whether a CFO application should be recommended for denial to the OLQ assistant commissioner and include in the determination the basis for denial under IC 13-18-10-2.1.
- 5.3. The IDEM Confined Feeding Operation Permits Section permit manager shall:
 - A. Ensure CFO applications are complete, including the disclosure section of the application.
 - B. Coordinate the review of the disclosure statements with the IDEM senior environmental manager.
 - C. Communicate with the CFO applicant regarding review of the disclosure section, including through Notice of Deficiencies.
- 5.4. The IDEM senior environmental manager shall:
 - A. Oversee the disclosure statement review process to ensure compliance with the Disclosure Law.
 - B. Review the disclosure section of CFO applications to verify whether one or more disclosure statements are required.
 - C. Work with the CFO applicant to ensure the application and any disclosure statements are complete.

- D. Notify the IDEM CFO permit manager of approval of the disclosure section of a CFO application or request further information from the applicant through a Notice of Deficiency.
- 5.5. The responsible party shall:
- A. Ensure understanding of the requirements of the Disclosure Law and this nonrule policy.
 - B. Evaluate all alleged material violations and determine whether substantial endangerment was present.
 - C. Complete a disclosure statement if required.
- 5.6. The applicant shall:
- A. Ensure understanding of the requirements of the Disclosure Law and this nonrule policy.
 - B. Determine whether a disclosure statement is required for each responsible party.
 - C. Submit a complete disclosure section of the CFO application.
 - D. Properly identify all officers, corporation directors, and senior management officials, if applicable.
 - E. Properly submit disclosure statements for each responsible party.
 - F. Provide the required public notice of the CFO application.

6.0 POLICY

Overview of the Disclosure Law and this nonrule policy

- 6.1. Under the CFO Law, a CFO application must include a disclosure statement by each responsible party when certain conditions are met. If required, a disclosure statement must:
- A. Include, in part, a description of pending and past state, federal, and foreign enforcement actions.
 - B. Be executed under oath, subject to the penalties for perjury.
- 6.2. IDEM may investigate and verify the information included in a disclosure statement.
- 6.3. IDEM may deny a CFO application based on the information included in the disclosure statement.
- 6.4. Questions which must be considered in determining whether a disclosure statement is required.
- A. Who are the responsible parties?
 - B. Have state, federal, or foreign officials alleged a responsible party committed violations of state, federal, or foreign environmental law?
 - C. Did the state, federal, or foreign officials allege a material violation?
 - D. Did the material violation present a substantial endangerment to human health or the environment?
 - E. Does a responsible party need to complete a disclosure statement if the only past enforcement actions are older than five years?
- 6.5. This nonrule policy will:
- A. Guide applicants on how to answer these questions by interpreting certain undefined statutory terms.
 - B. Clarify portions of the Disclosure Law which have caused confusion.
 - C. Explain IDEM's role in the disclosure review process.

Responsible Parties

- 6.6. The disclosure statement process shall begin by identifying all responsible parties.
- 6.7. At a minimum, one responsible party exists for each CFO application. If an individual is the applicant, they will be the sole responsible party. If a corporation, partnership, limited liability company (LLC), or business association is the applicant, the responsible parties will be one or more of the following: an officer, corporation director, and/or senior management official. IDEM's interpretations of these three terms, which are not defined in statute, are:
- A. Officer – Any person whose position is designated as an executive position by the business entity's charter, by-laws, or similar instruments; or who is vested with the

authority to make policy decisions on behalf of the business. Titles vary widely from company to company, but usually include chief executive officer, chief financial officer, president, vice president, secretary, or general counsel.

- B. Corporation director – A person who has a seat on the company’s board of directors. A corporation director is appointed or elected and is authorized to manage and direct the affairs of the company.
 - C. Senior management official – Any person with the highest level of management authority and who has the day-to-day tasks of managing the business. A senior management official may be known as an officer or a manager.
- 6.8. If an applicant is a corporation, partnership, LLC, or business association, all officers, corporation directors, and senior management officials shall be properly identified. Each of the individuals will be a responsible party and will be subject to the Disclosure Law.
- 6.9. Unlike corporations or partnerships, determining the responsible parties of an LLC applicant can be challenging. An LLC’s articles of organization may not provide for any senior management officials, officers, or managers, or if they do, it may not be public knowledge. Nonetheless, all LLCs have one or more senior management officials, managers, or officers. These officials may be set forth in the LLC’s operating agreement. If not, IDEM recommends that the LLC applicant, through its members, execute a resolution designating certain persons as senior management officials for purposes of the Disclosure Law. A resolution provides a strong and clear basis for designating responsible parties. In deciding whom to designate as a senior management official, the LLC should consider which high level persons within the organization will be responsible for the day-to-day management of the CFO, including compliance with environmental laws and regulations. The senior management official will likely have a financial interest in the LLC. However, not all LLC members will necessarily be a senior management official.
- 6.10. Once all responsible parties are identified, each must perform a disclosure statement review.

Material Violation

- 6.11. As a first step in the disclosure review process, a determination must be made as to whether any state, federal, or foreign official has alleged the responsible party committed acts or omissions constituting a material violation of environmental law under IC 13-18-10-1.4(a)(1) and (2).
- 6.12. The statute does not define material violation. IDEM’s interpretation is: An alleged violation resulting in a state, federal, or foreign administrative, civil, or criminal enforcement action.
- 6.13. Administrative and civil enforcement actions may result in the assessment of a civil penalty and an enforceable order to correct the violations.
- A. IDEM administrative enforcement actions are controlled by IC 13-30-3.
 - B. IDEM enforcement actions typically begin with a Notice of Violation and Proposed Agreed Order and may result in a Commissioner’s Order.
 - C. Although an IDEM inspection report may note violations (sometimes called a Violation Letter), it does not necessarily establish a material violation.
- 6.14. Although the types of violations alleged against a CFO applicant or other responsible party are typically CFO related, the Disclosure Law applies to material violations of any environmental law. Other common environmental laws and regulations may be related to solid waste, open dumping, air quality, open burning, water quality, and pesticides and herbicides. Any alleged material violations of these laws will be subject to potential disclosure.

Substantial Endangerment

- 6.15. Next, the disclosure review process will determine whether a material violation presented substantial endangerment. Under IC 13-18-10-1.4, a disclosure statement will only be required if the alleged material violation presented a substantial endangerment to human health or the environment.

- 6.16. The statute does not define substantial endangerment. IDEM's interpretation is: Substantial endangerment occurs when the alleged violation presented a reasonable cause for concern that the public or environment may be exposed to a risk of harm.
- 6.17. Factors relevant to a substantial endangerment finding include:
 - A. The nature, extent, and type of violation.
 - B. For spills and releases, the magnitude of contamination concentrations, if documented.
 - C. The pathways of the contamination, taking into account whether the contamination may:
 - 1. Migrate beyond the property boundaries.
 - 2. Reach or threaten to reach the waters of the state.
 - 3. Threaten drinking water supplies or sensitive ecosystems.
- 6.18. Substantial endangerment does not:
 - A. Require actual harm but only a threatened or potential harm.
 - B. Require quantification (e.g., proof a certain number of persons were exposed, proof a certain number of fish were killed, or contamination occurred at a specific concentration or quantity).
- 6.19. Whether a material violation presented substantial endangerment will be determined by specific facts and must be evaluated on a case-by-case basis. Some common examples of violations that can present substantial endangerment include:
 - A. Spills and releases of pollutants, including a failure to properly respond to a spill.
 - B. Constructing or operating without a required permit.
 - C. Manure land application violations threatening water quality such as overapplication of manure.
- 6.20. Material violations that typically do not present substantial endangerment usually fall under the category of paperwork violations. These violations do not necessarily expose the public or environment to a risk of harm.
- 6.21. Each responsible party shall evaluate all material violations and determine whether substantial endangerment is present. The presence of substantial endangerment is not always crystal clear. Being overinclusive rather than underinclusive in deciding whether substantial endangerment existed may avoid delay in IDEM's review and approval of a CFO application as well as answer any challenges to application approvals.

Timing of the Alleged Material Violation

- 6.22. Under IC 13-18-10-1.4(a), a disclosure statement will be required from each responsible party once any alleged material violation presenting substantial endangerment exists. Under those circumstances, the responsible party must complete and execute under oath a disclosure statement with the information listed under IC 13-18-10-1.4(c)(1)-(7).
- 6.23. IC 13-18-10-1.4(a) makes clear a CFO application must include a disclosure statement for each responsible party if state, federal, or foreign officials "at any time" alleged the responsible party committed acts or omissions presenting substantial endangerment.
- 6.24. However, per IC 13-18-10-1.4(c)(5) and (6), the disclosure statement must include a description of all finally adjudicated or settled administrative, civil, or criminal enforcement actions in the United States or a foreign country which were resolved within the five years preceding the date of the CFO application.
- 6.25. The difference between "at any time" under 6.23 and five years under 6.24 has caused confusion over whether a disclosure statement is required at all if a responsible party's only existing alleged material violations were resolved more than five years before the date of the CFO application. IDEM's interpretation is:
 - A. A responsible party must complete a disclosure statement even if the only applicable material violations were resolved more than five years before the date of the CFO application. However, such a disclosure statement does not have to provide a description of the violations.
 - B. In practice, this means:

1. A disclosure statement regarding alleged material violations that were resolved more than five years before the date of the CFO application would only need to include the information required in IC 13-18-10-1.4(c)(1), (2), (3), (4), and (7).
2. IDEM cannot deny a CFO application under IC 13-18-10-2.1(e)(2) solely for violations resolved more than five years before the date of the CFO application.

IDEM Review of the CFO Application Disclosure Section

- 6.26. To determine whether one or more disclosure statements are required, the IDEM CFO application form includes a disclosure section, which will walk the applicant through a series of questions.
- 6.27. To ensure compliance with the Disclosure Law, IDEM will:
 - A. Conduct a review of the information provided in this section, including the completeness of the responsible parties listed.
 - B. Conduct basic research into the enforcement history of the responsible parties, including research of other states and federal agencies.
- 6.28. If during IDEM's review a potential error or inconsistency is discovered in the disclosure section of a CFO application, IDEM:
 - A. Will work with the applicant to resolve the issue.
 - B. May include disclosure-related questions or requests in a Notice of Deficiency.
- 6.29. If IDEM discovers a responsible party intentionally misrepresented or concealed any material fact in the CFO application or a disclosure statement, IDEM may exercise its authority to deny the CFO application in accordance with IC 13-18-10-2.1.
- 6.30. Importantly, the purpose of the Disclosure Law is not to seek admissions from applicants or responsible parties, but to simply disclose alleged acts or omissions.

CFO Application Public Notice

- 6.31. Public notice of CFO applications is required to notify surrounding property owners under IC 13-18-10-2 and 327 IAC 19-8-7. Some petitions for administrative review of CFO approvals to the Office of Environmental Adjudication (OEA) have been based on claims that the applicant failed to include a complete disclosure statement. See examples Milco Dairy, LLC, 2017 OEA 18 and New Fashion Pork, LLP, 2012 OEA 1.
- 6.32. IDEM recommends applicants err on the side of caution in deciding whether to submit a disclosure statement. If doubt exists over whether a material violation or substantial endangerment exists, it is better to submit a disclosure statement unnecessarily than to fail to submit a disclosure statement which in fact is required by law.
- 6.33. Failing to submit a complete disclosure statement for all responsible parties will not only delay IDEM's issuance of a CFO application approval but can also lead to third-party appeals.

7.0 REFERENCES

7.1. Indiana Statutes

- A. [IC 4-22-2](#) Adoption of Administrative Rules
- B. [IC 13-11-2-8\(a\)](#) "Applicant"
- C. [IC 13-11-2-40](#) "Confined feeding operation"
- D. [IC 13-11-2-158\(b\)](#) "Person"
- E. [IC 13-11-2-191\(a\)](#) "Responsible party"
- F. [13-14-1-11.5](#) Use by Department of Policy or Statement; Presentation to Appropriate Board; Public Dissemination
- G. [IC 13-18-10](#) "Confined Feeding Control"
- H. [IC 13-18-10-1.4](#) Disclosure statement for confined feeding operation application
- I. [IC 13-18-10-2](#) Application for approval; notice requirements; renewal of approval; approval of manure management system
- J. [IC 13-18-10-2.1](#) Approval procedure; requirements; denial or revocation of approval
- K. [IC 13-30-3](#) Investigation of Violations; Administrative Proceedings and Order

7.2. Indiana Administrative Codes

- A. [327 IAC 19-8-7](#) Public comment periods and notifications

7.3. Decisions

- A. [OEA New Fashion Pork decision](#)
https://www.in.gov/oea/decisions/2012_OEA_1_New_Fashion_Pork.pdf
- B. [OEA Milco Dairy decision:](#)
<https://www.in.gov/oea/decisions/2017%20OEA%2018%20Milco%20Dairy,%20LLC.pdf>

8.0 SIGNATURES



Brian Reckensuess, Commissioner
Indiana Department of Environmental Management

01/20/22
Date



Peggy Dorsey, Assistant Commissioner
Office of Land Quality

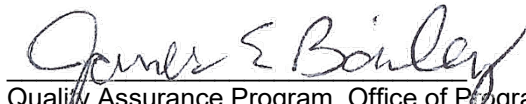
5/25/22
Date



Nancy King, Assistant Commissioner
Office of Legal Counsel

5/31/22
Date

This policy is consistent with Agency requirements.



Quality Assurance Program, Office of Program Support
Indiana Department of Environmental Management

22 Jun 2022
Date