

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

OFFICIAL SHORT CITATION NAME: When referring to 2012 OEA 1 cite this case as
New Fashion Pork, LLP, 2012 OEA 1.

TOPICS:

National Pollutant Discharge Elimination System (NPDES)	responsible party
Confined Feeding Operation (CFO)	material violation
Concentrated Animal Feeding Operation (CAFO)	substantial endangerment
Notice of Deficiency (NOD)	denial letter
Disclosure Statement Attachment	intentional misrepresentation
report spill	concealed a material fact
release	constituent application of statute
manure	fish kill
ammonium	civil penalty work sheets
ammonia	toxicologists
waters of the state	biologists
enforcement action	enforcement database
Agreed Order	statutory construction
	deference
	ambiguous

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: April Lashbrook, Esq.

Petitioner: Daniel P. McNerny, Esq., Alex C. Intermill, Esq.; Bose McKinney & Evans LLP

ORDER ISSUED:

January 5, 2012

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

3. Section IV.C. asks “Did the acts or omissions alleged, and acknowledged by a “Yes” answer to either or both questions A.1. or A.2. above, present a substantial endangerment to human health or the environment?”, and provides “Yes” and “No” boxes in response to the question.
4. On November 12, 2009, NFP entered into an Agreed Order with IDEM.
5. Finding of fact 7 of the November 12, 2009 Agreed Order includes the statements that “Respondent allowed manure into Bogard Creek, a water of the state”, and “Respondent failed to report a spill of manure into Bogard Creek”.

Indiana 1 (Linton) Applications

6. On March 10, 2010, IDEM received NFP’s National Pollution Discharge Elimination System (“NPDES”) Confined Feeding Operation (“CFO”) Application for its Indiana 1 operation, Farm I.D. #3658¹, Linton, Greene County, Indiana. The CFO Application seeks permanent approval for a manure storage impoundment.
7. Because IDEM had alleged that NFP had allowed manure into Bogard Creek, and had failed to report the spill, NFP checked the “Yes” box in response to Section IV.A.1. of the Disclosure Forms for its Indiana 1 CFO application (and for each of the three applications in controversy).
8. On April 9, 2010, IDEM issued Notice of Deficiency 1 to NFP regarding the CFO Application (“NOD 1”)². NOD 1 stated that the Disclosure Statement Attachment form submitted to IDEM by NFP was incomplete and needed to be resubmitted with corrections. NOD 1 stated that New Fashion Pork, LLP must be listed in Section III of the Disclosure Statement Attachment as a Responsible Party. It also stated that a Section IV and Section V of the Disclosure Statement Attachment must be completed. Specifically, NOD 1 states in part:

In performing a completeness check of the disclosure information provided, New Fashion Pork, LLP was subject to an enforcement action resulting in the attached Agreed Order adopted November 12, 2009. The terms “material violation” and “substantial threat to human health or the environment” are explicitly out of the statutory disclosure requirements authored by the legislature. They are not IDEM terms. However, the attached IDEM-provided form states: “violations which

¹ Complete copies of each of NFP’s application are substantial evidence in the record of these cases; they were entered into evidence at hearing without objection.

² The cited correspondence between IDEM and NFP and its agents are substantial evidence in the record of these cases as they were entered into evidence at hearing without objection.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

occurred at a facility and were noted in a mailed violation letter, notice, or order from a regulatory agency” are of special interest in providing responses to the disclosure statement obligation questions in section IV. The onus is on the applicant to determine who a responsible party is associated with a submitted application and if the responsible party has had any material violations which were a substantial threat to human health or the environment. In reviewing the attached Agreed Order and noting 7a, 7b, 7d and 7e within the I. Findings of Fact section, the discharge attributed to New Fashion Pork, LLP is a violation which must be reported via a completed disclosure statement (indicated by selecting “Yes” to IV.A.1. and IV.C) to proceed with processing the submitted application.

A copy of the November 12, 2009 Agreed Order was attached to NOD 1.

9. On June 1, 2010, IDEM issued Notice of Deficiency 2 to NFP regarding the CFO Application, reiterating that the alleged deficiencies noted in NOD 1 had not been addressed.
10. On or about July 2, 2010, NFP submitted a revised Disclosure Statement Attachment, dated June 30, 2010, naming New Fashion Pork, LLP as a Responsible Party and resubmitting NFP’s prior responses Sections IV.A. and C.
11. On June 14, 2010, IDEM received NFP’s Concentrated Animal Feeding Operation (“CAFO”) Application for its Indiana 1 operation. This Application sought approval to construct a new 400-head gilt gestation building and to obtain NPDES CAFO general permit coverage for the Indiana 1 operation.
12. Because IDEM had alleged that NFP had allowed manure into Bogard Creek, and had failed to report the spill, NFP checked the “Yes” box in response to Section IV.A.1. of the Disclosure Forms for its Indiana 1 CAFO application (and for each of the three applications in controversy).
13. On July 22, 2010, IDEM issued a Notice of Deficiency regarding the CAFO Application (the “CAFO NOD”). The CAFO NOD alleged that the Disclosure Statement Attachment Section IV submitted to IDEM on June 30, 2010, was incomplete and needed to be resubmitted with corrections. The CAFO NOD reiterated the language quoted above from NOD 1, once again requiring NFP to select a “Yes” response to question IV.C. of the Disclosure Statement Attachment³.

³ The CAFO NOD, and the Denial Letter, due to typographical error, incorrectly cite to items 5B, 5D and 5E of the November 12, 2009 Agreed Order, which do not exist, in support of its position. The April 9, 2010 NOD 1 correctly referenced items 7a, 7b, 7d and 7e.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

14. On September 15, 2010, Michael A. Veenhuizen, Ph.D., President and Senior Engineer for Livestock Engineering Solutions, Inc., submitted a detailed response to the CAFO NOD on behalf of NFP (the “Veenhuizen Response”). The Veenhuizen response explained that NFP had correctly completed section IV of the Disclosure Statement Attachment form, and why it would be inappropriate for NFP to select the “Yes” response to section IV.C.
15. On September 20, 2010, IDEM issued correspondence to NFP denominated as Notice of Deficiency - #4 (“NOD 4”), regarding the CAFO Application.⁴ While NOD 4 acknowledged receipt of the Veenhuizen Response, it failed to address it, and reiterated that the Disclosure Statement Attachment remained incomplete as alleged in the CAFO NOD. NOD 4 stated in part:

This will be your last opportunity to complete your application materials. The commissioner will deny a permit application because the application is incomplete if the requested information is not received.
16. On October 25, 2010, NFP, by counsel, responded to NOD 4, reiterating that NFP had properly completed its applications, and requested that IDEM complete its review of the applications and issue the requested approvals.
17. On February 28, 2011, NFP received IDEM’s Denial Letter for both the CFO and CAFO applications for Indiana 1.

Indiana 2 (Bloomfield) Application

18. On June 14, 2010, IDEM received NFP’s CAFO Application for its Indiana 2 operation, Farm I.D. #3781, Bloomfield, Greene County, Indiana. The CAFO Application sought renewal of NFP’s general permit coverage for its Indiana 2 operation. It also sought to update the number of production buildings and operating capacity to include structures which existed at the time of NFP’s purchase of the operation, but for which no formal IDEM approval could be documented.
19. Because IDEM had alleged that NFP had allowed manure into Bogard Creek, and had failed to report the spill, NFP checked the “Yes” box in response to Section IV.A.1. of the Disclosure Forms for its Indiana 2 CAFO application (and for each of the three applications in controversy).

⁴ NOD 1 and NOD 2 were directed to the CFO Application, not the CAFO Application.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

20. On July 2, 2010, IDEM issued Notice of Deficiency 1 to NFP regarding the CAFO Application (“NOD 1”). NOD 1 stated that the Disclosure Statement Attachment form submitted to IDEM by NFP was incomplete and needed to be resubmitted with corrections. NOD 1 stated that New Fashion Pork, LLP must be listed in Section III of the Disclosure Statement Attachment as a Responsible Party. It substantially repeated the language quoted in Finding of Fact 8 above.
21. On July 2, 2010, NFP revised the Disclosure Statement Attachment, naming New Fashion Pork, LLP as a Responsible Party and resubmitting Sections IV.A. and C., which had been previously completed by NFP (the “June 30, 2010 Disclosure Statement”).
22. On July 22, 2010, IDEM issued a Notice of Deficiency regarding the CAFO Application (the “CAFO NOD”). The CAFO NOD alleged that the Disclosure Statement Attachment Section IV submitted to IDEM dated June 30, 2010, was incomplete and needed to be resubmitted with corrections. The CAFO NOD reiterated the language quoted above from NOD 1, once again requiring NFP to select a “Yes” response to question IV.C. of the Disclosure Statement Attachment⁵.
23. The September 15, 2010, correspondence from Dr. Veenhuizen also addressed the CAFO NOD.
24. On September 20, 2010, IDEM issued Notice of Deficiency - #3 (“NOD 3”), regarding the CAFO Application. While NOD 3 acknowledged receipt of the Veenhuizen Response, it failed to address it, and reiterated that the Disclosure Statement Attachment remained incomplete as alleged in the CAFO NOD. NOD 3 stated in part:

This will be your last opportunity to complete your application materials. The commissioner will deny a permit application because the application is incomplete if the requested information is not received.
25. The October 25, 2010, correspondence from counsel for NFP also addressed this application.
26. NFP elected to respond “Yes” box in response to Section IV.A.1 of the Disclosure Forms for each of the three applications in controversy because IDEM had alleged that NFP had allowed manure into Bogard Creek, and had failed to report the spill.

⁵ The CAFO NOD, and the Denial Letter, due to typographical errors, incorrectly cite to items 5B, 5D and 5E of the November 12, 2009 Agreed Order, which do not exist, in support of its position. The July 2, 2010 NOD 1 correctly referenced items 7a, 7b, 7d and 7e.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

27. Based upon its thorough evaluation of the March 8, 2009, release to Bogard Creek, including sampling data collected by IDEM with respect to the release, NFP concluded that the release did not “. . . present a substantial endangerment to human health or the environment”, and therefore checked the “No” box in response to Section IV.C. of the Disclosure Forms for each of the three applications in controversy. Hearing Transcript, pp. 98-99, 204-206 (hereinafter: T., p. ____).
28. Based upon this conclusion, NFP did not change its responses to Section IV.C. from “No” to “Yes” as requested by IDEM in its notices of deficiency. (T., pp. 209-215).
29. On February 24, 2011, IDEM issued a Denial Letter denying the CFO and CAFO applications for Indiana 1 and a separate Denial Letter denying the CAFO application for Indiana 2. In the Denial Letters for both the Indiana 1 and Indiana 2 applications, IDEM stated, as it had in previous Notices of Deficiency, that “In reviewing the November 12, 2009 Agreed Order and noting (sic) 5.B, 5.D., and 5.E. within the I. Finding of Fact section, the discharge attributed to New Fashion Pork, LLP is a violation which must be reported via a completed Disclosure Statement, by selecting a “Yes” response to question IV.C. of the Disclosure Statement Attachment.”. IDEM concluded that “per IDEM I.C. § 13-18-10-2.1(e) you intentionally misrepresented or concealed a material fact in the approved application regarding the required Disclosure Statement”, and that the applications were “. . . hereby denied for failure to submit a complete application”.
30. On March 11, 2011, NFP timely sought administrative review of both February 24, 2011 Denial Letters for the three applications.

IDEM’s General Interpretation and Application of I.C. § 13-18-10-1.4

31. Subsequent to the enactment of I.C. § 13-18-10-1.4 in 2009, IDEM has consistently interpreted and applied that provision.
32. IDEM’s interpretation and application of I.C. § 13-18-10-1.4 is not disputed by the parties. It is IDEM’s position that its interpretation should be granted deference by the Office of Environmental Adjudication (“OEA”). NFP argues that IDEM’s interpretation is arbitrary and capricious, and does not effectuate the intent of the legislature.
33. Mike Dunn, IDEM Senior Environmental Manager, testified on behalf of IDEM. Mr. Dunn’s qualifications were introduced at hearing without objection, and he testified regarding his master’s education level and work background in the area of environmental science. Mike Dunn has a Master’s degree in Environmental Management, has worked in the public sector for fifteen years, more than ten years for IDEM.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

34. IDEM requires that every CFO or CAFO applicant subject to I.C. § 13-18-10-1 complete and include the Disclosure Form as part of its application, regardless of whether state or federal officials at any time alleged the responsible party or parties committed acts or omissions that constituted a material violation of state or federal law, or whether any acts or omissions alleged, and acknowledged by a “Yes” answer to the questions in Section IV.A. presented a substantial endangerment to human health or the environment. (T., p. 46).
35. In making its determination as to whether a release to waters of the state presents a substantial endangerment to human health or the environment, IDEM testimony presented substantial evidence that it carefully considered its interpretation of “substantial endangerment to human health or the environment”. IDEM consulted with its legal counsel, and developed unpublished internal policy guidance for reviewing Disclosure Statement Attachments. *Mike Dunn Testimony*. To assure consistent, accurate review, IDEM assigns review of Disclosure Statement Attachments to one staff member, Mike Dunn. *Id.* IDEM has reviewed almost two hundred Disclosure Statement Attachments since the statute was adopted. *Id.* In each case where IDEM required an applicant to confirm that there was a “material violation . . . present[ing] a substantial endangerment to human health or the environment”, IDEM took formal enforcement action which resulted in Agreed Orders, just as IDEM did with NFP. *Id.*
36. In order to avoid inconsistent application of the statute, IDEM does not analyze, evaluate, or take into account: the volume of the alleged release; the concentration of the alleged release; whether the alleged release resulted in a fish kill; or the civil penalty worksheets prepared in response to the alleged release. IDEM’s internal discussions gave consideration to, but rejected, utilizing factors such as volume of a release, concentration of a release, or the existence of a fish kill in determining whether a release presented a substantial endangerment to human health or the environment. (T., pp. 44-45). IDEM states, in its October 7, 2011 Post-Hearing Brief, that “[t]he use of such parameters could be arbitrary, absent firm definitions or explicit thresholds.” P. 7.
37. IDEM consulted with no biologists or toxicologists in formulating their interpretation that any release to waters of the state presents a substantial endangerment to human health or the environment. (T., p. 52).
38. As stated by IDEM’s Mike Dunn, who was responsible for reviewing NFP’s Disclosure Forms, “if anywhere in there, it talks about a release to the environment, that is where we would draw the line. Anything greater than a paperwork issue, we would expect to see IV.C. have a “Yes” response. (T. pp. 43-44). Even if IDEM considered a release to be minor, if it resulted in IDEM taking an enforcement action, IDEM would require a “Yes” response to

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

Section IV.C. (T. p. 45). IDEM relies solely upon an allegation of a release to waters of the state in requiring a “Yes” response to Section IV.C.

39. IDEM considers an allegation any “non-paperwork” violation resulting in a release to the environment identified in IDEM’s enforcement database, to constitute a material violation, necessitating a “Yes” response to Section IV.A.1. (T., pp. 31-32).
40. IDEM considers any allegation of an alleged release of manure to waters of the state identified in the IDEM enforcement database to constitute an act or omission which presents a substantial endangerment to human health or the environment, necessitating a “Yes” response to Section IV.C. of the Disclosure Form. (T., pp. 33-34).

IDEM’s Application of I.C. § 13-18-10-1.4 To NFP’s Release

41. Upon receipt of NFP’s Disclosure Form for the Indiana 1 CFO, CAFO and Indiana 2 CAFO Applications, Mike Dunn accessed the IDEM enforcement database and located the November 12, 2009 Agreed Order. Upon review of finding 7.a. that “Respondent allowed manure into Bogard Creek, a water of the state”, Mr. Dunn determined that NFP was required to check the “Yes” box to Section IV.C. of the Disclosure Form. He did not conduct any further review of the Agreed Order, or any subsequent findings. (T., pp. 268-270).
42. In determining that NFP was required to check the “Yes” box to Section IV.C., Mr. Dunn conducted no investigation, analysis, or evaluation of the volume of the release, concentration of the release, whether the release resulted in a fish kill, or any evaluation of the release contained in the civil penalty worksheets prepared by the IDEM Office of Enforcement. (T., pp. 51-52).
43. Mr. Dunn’s determination that the release of manure to Bogard Creek referenced in the November 12, 2009 Agreed Order presented a substantial endangerment to human health or the environment was based solely upon the one sentence in finding 7.a. of the Agreed Order. Mr. Dunn consulted with no biologist or toxicologist with respect to his determination.

Evidence Regarding Substantial Endangerment

44. Dr. Michael A. Veenhuizen, Ph.D., prepared the three applications at issue on behalf of NFP, and testified on behalf of NFP at hearing.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

45. Dr. Veenhuizen's curriculum vitae was introduced into evidence without objection, and he testified regarding his doctorate level, education, and work background regarding livestock operations, including the assessment of the significance of the impact or severity of manure releases to the environment. (T., pp. 82-87).
46. Dr. Veenhuizen is an expert in the impacts of ammonia on the environment, based upon both his educational background and his work experience. Dr. Veenhuizen has authored a published article regarding the impact of ammonia and manure releases to water entitled "Avoiding Stream Pollution". (T., pp. 332-334).
47. Dr. Veenhuizen testified extensively regarding the effect of ammonia and ammonium on the environment. (T., pp. 331-341). Dr. Veenhuizen testified regarding the relevance of ammonia and ammonium, pH and temperature with respect to the potential impacts of a manure release to the environment.
48. Dr. Veenhuizen testified that he, in consultation with Jay Moore of NFP, and other members of NFP's management team, specifically analyzed the release to Bogard Creek referenced in the November 12, 2009 Agreed Order, including the data obtained by IDEM. This data included a field kit reading of 8 parts per million ("ppm") total ammonia, a pH reading of 7.5 and a water temperature reading of 61 degrees. (T., p. 63).
49. Dr. Veenhuizen testified that: the field kit utilized by IDEM measured total ammonia, which would include concentration of both ammonia and ammonium; ammonium has a much smaller impact on the environment than ammonia; a pH reading of 7.5 would result in a lesser ammonia concentration, approximately .5 to 1.3% of the 8 ppm total ammonia field reading; and a water temperature of 61° would result in reduced impacts from ammonia. (T., pp. 333-340).
50. Dr. Veenhuizen stated that in his professional opinion, based upon all the data available to him, the release of manure to Bogard Creek referenced in the November 12, 2009 Agreed Order, did not present a substantial endangerment to human health or the environment. (T., pp. 153-154).
51. Jay Moore, NFP's Director of Environmental Services, testified on behalf of NFP. Mr. Moore's curriculum vitae was introduced at hearing without objection, and he testified regarding his master's education level and work background in the area of environmental science.
52. Mr. Moore testified regarding his expertise in the investigation and evaluation of releases of pollutants to the environment, and in particular, to water. (T., pp. 182-193).

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

53. Mr. Moore also testified regarding his experience in emergency response procedures and actions associated with releases of manure to waters of the state. (T., pp. 195-201).
54. Mr. Moore had direct communications with his staff and Mr. Charles “Andy” Stinchfield of IDEM’s Office of Emergency Response, who were on site the day the release was discovered. (T., pp. 198-199).
55. IDEM required no emergency response, clean up, or remediation of the release to Bogard Creek. (T., p. 198).
56. Mr. Moore stated in his expert opinion, that based upon his evaluation of all available data, including his interactions with Mr. Stinchfield, and in consultation with Dr. Veenhuizen and other members of NFP’s management team, the March 8, 2009 release to Bogard Creek did not present a substantial endangerment to human health or the environment. (T., pp. 214-215).
57. Andy Stinchfield testified on behalf of IDEM at hearing. Mr. Stinchfield has an associate degree in agribusiness. Mr. Stinchfield performed the field screening for total ammonia on March 8, 2009 downstream from the NFP Indiana 2 operation, and also sampled for pH and temperature. (T., pp. 234-235).
58. Mr. Stinchfield testified that in his experience, an ammonia field screen result of greater than 8 ppm, regardless of temperature or pH, will kill fish. (T., p. 236).
59. Dr. Veenhuizen disagreed with Mr. Stinchfield’s conclusion, concluding that depending on a variety of factors, fish can tolerate ammonia levels of 24-30 ppm without a problem. (T., pp. 332, 340).
60. Mr. Stinchfield observed no evidence of a fish kill as a result of the release to Bogard Creek. (Pet. Ex. 8).
61. Mr. Stinchfield testified that he observed no fish, either dead or alive, in Bogard Creek, but that the water in the creek was opaque and discolored. (T., pp. 253-254).
62. Mr. Moore testified that he has walked Bogard Creek extensively many times, including before the March 8, 2009 release, and again on March 10, 2009, and has observed fish every time. He has also observed bass, crayfish, and snakes. (T., pp. 348-350).

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

63. Based upon the evidence presented, and the testimony of the witnesses, and weighing the credibility of those witnesses, the March 8, 2009 manure release to Bogard Creek did not present a substantial endangerment to human health or the environment.
64. IDEM identified no deficiencies in any of the applications other than NFP's alleged failure to check the "Yes" response to Section IV.C., and stated in the Denial Letters that "The completion of the [Disclosure Form] submittal as requested . . . would have brought your application into conformance with IDEM expectations".⁶ (T., pp. 66-68, 93-94, Denial Letter).

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over decisions of the Commissioner of IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3. I.C. § 4-21.5-3, *et seq.* and I.C. § 4-21.5-7, *et seq.*, allow the OEA to promulgate rules and standards in order to allow it to conduct its duties.
2. This is a Final Order pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as conclusions of law that may be construed as findings of fact are so deemed.
3. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. I.C. § 4-21.5-3-27(d); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "De novo review" means that "all issues are to be determined anew, based solely upon the evidence adduced at the hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. 4-21.5-3-27(d). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct.

⁶ The deficiency noted by IDEM that NFP correct the notices to include New Fashion Pork, LLP as a responsible party was rectified by NFP, and is not in issue.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

App. 1993). *Gas America* 347, 2004 OEA 123, 129. See also *Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service*, ELF #9810570/FID #1054, *New Castle, Henry County, Indiana*; *Winimac Service*, ELF #9609539/FID #14748, *Winimac, Pulaski County, Indiana*; *HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26,41.

5. I.C. § 13-18-10-1.4 governs the circumstances when IDEM may require a CFO, or an applicable CAFO applicant, to include a Disclosure Form with their application. In these cases, NFP is not challenging the contents of the Disclosure Form itself, but rather when that form must be included with an application and how it must be completed.
6. I.C. § 13-18-10-1.4 (2009) establishes the requirements for when an applicant for a Confined Feeding Operation (“CFO”) or for a Concentrated Animal Feeding Operation (“CAFO”) must include a disclosure statement with their application, and provides, in pertinent part:
 - a. Subject to subsection (b), an application for approval under section 1 of this chapter must include for each responsible party the disclosure statement referred to in subsection (c) if either or both of the following apply:
 - (1) State or federal officials at any time alleged that the responsible party committed acts or omissions that constituted a material violation of state or federal environmental law.
 - (2) Foreign officials at any time alleged that the responsible party committed acts or omissions that:
 - (A) constituted a material violation of foreign environmental law; and
 - (B) would have constituted a material violation of state or federal environmental law if the act or omission had occurred in the United States.
 - b. Subsection (a):
 - i. applies only if the acts or omissions alleged under subsection (a)(1) or (a)(2) presented a substantial endangerment to human health or the environment; and
 - ii. does not apply to a renewal of an approval under section 1 of this chapter that does not involve construction or expansion as described in section 1 of this chapter.

Here, NFP challenges IDEM’s interpretation and application of the above provision, which resulted in the denial of three applications for NFP’s operations in Indiana. IDEM responds that the Office of Environmental Adjudication (“OEA”) should defer to IDEM’s interpretation of this provision.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

7. IDEM denied NFP's applications per I.C. § 13-18-10-1.4(e), alleging that NFP intentionally misrepresented or concealed a material fact in the approved application regarding the required Disclosure Statement", and that the applications were ". . . hereby denied for failure to submit a complete application".
8. I.C. § 13-18-10-1.4 is unambiguous in requiring an applicant to include a Disclosure Form with its application when two conditions are present. First, state or federal (or foreign) officials alleged that the responsible party committed acts or omissions that constituted a material violation of state or federal environmental law. Second, if the acts or omissions alleged presented a substantial endangerment to human health or the environment. These are the only circumstances under which IDEM may require an applicant to include a Disclosure Form with its application.
9. IDEM has no authority to require any applicant subject to I.C. § 13-18-10-1 to include the Disclosure Form with their application unless it meets the criteria immediately above.
10. IDEM's argument that it has created the Disclosure Form, and the Disclosure Form is part of the application, and application for approval must be made on a form provided by IDEM and thus every applicant must include the Disclosure Form in their application, ignores the express limiting language of I.C. § 13-18-10-1.4. The specific limitation contained in I.C. § 13-18-10-1.4 regarding when IDEM may require an applicant to include a Disclosure Form in its application overrides the general language contained in I.C. § 13-18-10-2(a), that applicants are required to utilize IDEM forms when submitting their applications. It is an established rule of statutory construction ". . . that where provisions of a statute conflict, the specific provision takes priority over the general provision". *Robinson v. Wroblewski*, 704 N.E.2d 467 at 475 (Ind. 1998).
11. I.C. § 13-18-10-1.4(b) unambiguously states the Indiana legislature's mandate that IDEM create and require submission of a disclosure form for stated criteria. Further, the statute requires qualifying applicants to complete the disclosure form.
12. In *Chevron v. NRDC*, 467 U.S. 837, 842-3 (1984), the United States Supreme Court stated that if the intent of the legislature is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent" of the legislature.⁷ This threshold test for deference applies in this Cause, as the Indiana General Assembly's intent in the Disclosure Statute is clear and unambiguous. Because the Disclosure Statute is clear and unambiguous, IDEM's interpretation of the law is not due deference.

⁷ *Chevron, U.S.A., Inc. v. NRDC, Inc., et al.*, 467 U.S. 837, 842-3 (1984).

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

13. Even if the Disclosure Statute is susceptible to more than one interpretation, federal, Indiana, and OEA precedent preclude OEA from giving deference to IDEM’s interpretation of the Disclosure Statute in this case. In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the Supreme Court held that “Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.” Rather, such interpretations only get “respect” to the extent they are persuasive. IDEM’s interpretation of the Disclosure Statute is not the product of a promulgated rule, but rather comes from an informal policy developed by IDEM’s Assistant Commissioner of the Office of Land Quality, IDEM’s legal counsel, and Senior Environmental Manager, Mike Dunn. (T., p.35). The disclosure form itself informs applicants that past enforcement actions “are of special interest”, but does not advise that they automatically constitute “substantial endangerment”. Per the holding in *Christensen*, such a policy is not entitled to *Chevron*-style deference, but may receive respect or be given weight to the extent that it is persuasive.
14. In weighing the balance between deference to IDEM, and many of its highly qualified staff members, and the statutory mandate that OEA review IDEM decisions *de novo*, OEA has considered circumstances where *Chevron*-style deference may be appropriate. Based on federal cases, including *Chevron* and *Christensen*, and Indiana cases. including *Ind.-Ky. Elec. Corp. v. IDEM*, 820 N.E.2d 771 (Ind. Ct. App. 2005) (OEA’s conclusion that it must defer to IDEM’s interpretation was an error), “OEA owes no deference to the IDEM’s interpretations when reviewing the agency’s actions.” *Objection to the Issuance of New Construction FESOP Permit No. F133-28725-00003 Putnam County Ethanol, LLC*, 2011 OEA 1. OEA has explicitly stated in its decisions over the last several years that it “will not defer to IDEM’s interpretation.”
15. Although the OEA owes no deference to IDEM’s interpretation of and policy regarding the Disclosure Statute, it can give respect or greater weight to the interpretation and policy if: (1) the Disclosure Statute is ambiguous; (2) significant policy concerns are involved; (3) the subject matter concerns highly technical matters where the IDEM’s expertise is beneficial; and (4) the OEA finds that IDEM’s interpretation of the Disclosure Statute is consistent with the rules of statutory construction. As in *Putnam County Ethanol, LLC*, no weight should be given to IDEM’s interpretation as (1) the Disclosure Statute is not ambiguous, (2) IDEM’s interpretation is inconsistent with the rules of statutory construction, and (3) the subject matter concerns highly technical matters where the IDEM’s expertise would be beneficial.
16. IDEM correctly interprets the statutory requirement by requiring disclosure of any state or federal allegation. Section IV.A.1. of the form, in asking “Have state or federal officials at any time alleged that the responsible party or parties committed acts or omissions that constituted a material violation of state or federal law?”, and providing “Yes” and “No”

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

boxes in response to the question, is a clear and appropriate exercise of IDEM's duty to seek disclosure of qualifying events from qualifying applicants.

17. NFP submitted a "yes" response to Sec. IV.A.1 of its three applications. Whether NFP had a duty to do so is rendered moot by its voluntary submission.
18. Ripe for review is whether NFP had a duty to respond "yes" to Sec. IV.C., which asks "Did the acts or omissions alleged, and acknowledged by a "Yes" answer to either or both questions A.1. or A.2. above, present a substantial endangerment to human health or the environment?" In this case, NFP answered "no" to the Disclosure Form's Section IV.C query as to "Did the acts or omissions alleged, and acknowledged by a "Yes" answer to either or both questions A.1. or A.2. above, present a substantial endangerment to human health or the environment?" NFP responded "No", and supplemented its response with specific scientific and eyewitness data about the extent and impact of the manure spill.
19. No specific statutory or regulatory definition is provided for the terms "material violation" or for "substantial endangerment to human health or the environment." In its NODs, IDEM informed NFP that the onus was on NFP to determine whether material violations occurred, and whether they were of such magnitude to present a "substantial endangerment to human health or the environment."
20. IDEM interprets "substantial endangerment to human health or the environment" as any allegation of an alleged release of manure to waters of the state identified in the IDEM enforcement database to constitute an act or omission which presents a substantial endangerment to human health or the environment. Here, IDEM did not analyze, evaluate, or take into account: the volume of the alleged release; the concentration of the alleged release; whether the alleged release resulted in a fish kill; or the civil penalty worksheets prepared in response to the alleged release. As stated by IDEM's witness, Mike Dunn, who was responsible for reviewing NFP's Disclosure Forms, "if anywhere in there, it talks about a release to the environment, that is where we would draw the line. Anything greater than a paperwork issue, we would expect to see IV.C. have a "Yes" response. Mike Dunn did not take into account any of the sampling data in making his determination that the March 8, 2009 release of manure presented a substantial endangerment to human health or the environment. In this case, IDEM asks OEA to grant deference to this interpretation, but IDEM has presented no evidence to support an unexamined determination that every release of manure to waters of the state presents a substantial endangerment to human health or the environment. Nor has IDEM presented evidence that its efforts in this case required IDEM to use expertise in making its determination.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

21. IDEM's determination that the allegation of a manure release to Bogard Creek contained in the November 12, 2009 Agreed Order presented a substantial endangerment to human health or the environment, based upon its interpretation that any alleged release to waters of the state presents a substantial endangerment to human health or the environment, does not give effect to the intent of the legislature as expressed in I.C. § 13-18-10-1.4(b)(1). The plain meaning of the words used in this legislation demonstrate that the purpose of this statute is to obtain disclosure, not to seek admissions that activities substantially endangered the environment.
22. As noted in the Disclosure Form, the onus is on the responsible party to determine whether a substantial endangerment to human health or the environment occurred. Supplemental material provided by NFP allowed IDEM to determine the basis for NFP's determination. Experienced and educated witnesses for both parties measured and observed the activity which became the subject of the Agreed Order. Ammonia levels of 8 ppm were measured. While each party's witnesses disputed the ammonia levels which would result in fish kills, no dead fish were observed, but the receiving body of water exhibited the opaque coloring and odor common to manure contamination. Although IDEM witness Dunn raised potential concerns with the sufficiency of information provided by NFP, by substantial evidence, NFP substantially disclosed information required by I.C. § 13-18-10-1.4(b)(1).
23. NFP did not intentionally misrepresent or conceal a material fact in any of its applications regarding the disclosure statements it submitted.
24. NFP did not fail to submit complete applications.
25. IDEM's denial of the CFO and CAFO applications for Indiana 1, and the CAFO application for Indiana 2, based upon NFP's failure to check the "Yes" box to Section IV.C. of the Disclosure Form is not supported in fact or in law.
26. IDEM identified no other deficiencies in any of the applications which would support denial of the applications.
27. NFP correctly completed Section IV.C. of the Disclosure Form by checking the "No" box, and supplemented its response, thus fulfilling the purpose of I.C. § 13-18-10-1.4.
28. There are no factual or legal grounds upon which to deny the applications.
29. NFP's applications should be approved.

**Objection to the Denial of Applications for CFO Approval and NPDES CAFO
Construction/Expansions, Farm ID No. 3658
New Fashion Pork, LLP - Indiana 1
Linton, Greene County, Indiana; consolidated with
NPDES CAFO Renewal and Update Application, Farm ID No. 3781
New Fashion Pork, LLP – Indiana 2
Bloomfield, Greene County, Indiana (11-W-J-4465)
2012 OEA 1, (11-W-J-4464)**

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. NFP's Petitions for Administrative Review are granted.
2. The February 24, 2011 Denial of Applications for the CFO and CAFO applications for NFP's Indiana 1 operation, and the February 24, 2011 Denial of Application for NFP's CAFO application for its Indiana 2 operation, are overturned.
3. Within thirty (30) days of the effective date of this Final Order, IDEM shall take all actions necessary to issue its approval for the CFO and CAFO applications for the Indiana 1 operation, and the CAFO application for the Indiana 2 operation.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commission of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 5th day of January, 2012, in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge