

**OBJECTION TO THE ISSUANCE OF CONFINED FEEDING OPERATION
APPROVAL
FARM ID #6868 / ANIMAL WASTE #AW-6521
MILCO DAIRY, LLC
LEWISVILLE, RUSH COUNTY, INDIANA
2017 OEA 18, (15-S-J-4947)**

OFFICIAL SHORT CITATION NAME: When referring to 2017 OEA 18 cite this case as
Milco Dairy, LLC, 2017 OEA 18.

TOPICS:

Approval
confined feeding operation (CFO)
confined animal feeding operation (CAFO)
responsible party
senior management official
disclosure statement
nutrient management
recordkeeping
I.C. § 13-11-2-191(a)
I.C. § 13-18-10-1.4
I.C. § 13-18-10-1.4(c)(5)
40 CFR 122.42(e)
327 IAC 19-11-1(a)

PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Douglas Louks, Esq.
Petitioner: Kim Ferraro, Esq.; Hoosier Environmental Council
Permittee: Brianna Schroeder, Esq.; Todd Janzen, Esq.; Janzen Agricultural Law, LLC

ORDER ISSUED:

February 27, 2017

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF CONFINED)
FEEDING OPERATION APPROVAL)
FARM ID #6868, ANIMAL WASTE #AW-6521)
MILCO DAIRY FARM LLC)
LEWISVILLE, RUSH COUNTY, INDIANA)
) CAUSE NO. 15-S-J-4847

House of Prayer Ministries, Inc. d/b/a Harvest Christian)
Camp)
Petitioner)
Milco Dairy Farm LLC and Nico Niessen)
Permittees/Respondents)
Indiana Department of Environmental Management)
Respondent)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the OEA) for a final evidentiary hearing on October 17, 2016. The OEA, having read the record and examined the evidence and heard testimony enters the following findings of fact and conclusions of law and final order.

FINDINGS OF FACT

1. On June 9, 2015, Milco Dairy Farm LLC (Milco) submitted its CFO/CAFO Application Packet to the Indiana Department of Environmental Management (the IDEM). Milco listed Nico Niessen and Milly Niessen as responsible parties.¹
2. In its application, both Nico and Milly Niessen acknowledged that state or federal officials had alleged that they, as responsible parties, had committed “acts or omissions that constitute a material violation of state or federal environmental law”². In their disclosure statement, the Niessens listed three historical incidents related to its existing dairy.³ It included an August 23, 2012 agreed order related to construction of a calf barn and barn extension without IDEM approval. Milco paid a fine and met the conditions of

¹ Exhibit 8 - CFO/CAFO Application Packet, dated June 9, 2015, page 22, Section 1.
² Exhibit 8 - CFO/CAFO Application Packet, dated June 9, 2015, page 23 and 24, Section IIA
³ Exhibit 8 - CFO/CAFO Application Packet, dated June 9, 2015, page 25.

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the agreed order.⁴ The case was resolved on January 23, 2013. Milco also included an August 5, 2014 inspection showing an alleged violation regarding stormwater management, construction without a permit, and waste storage. Milco corrected these alleged violations. Finally, Milco listed some issues culminating in an IDEM agreed order dated July 13, 2004 related to construction of the manure control facility. Milco complied with the terms of this order. No manure releases occurred.

3. The Niessens explained that they did not consider the violations to have presented a substantial endangerment to human health or the environment as the alleged violations did not result in a “material release of manure to the environment.”⁵
4. Nik Niessen was not listed as a responsible party. Milco admitted that “Milco indicated to the Rush County Board of Zoning Appeals that Nik Niessen would build his family’s home on the same plot of land as the proposed dairy, making him the closest residence. Nik and his family intend to become part owners of the proposed dairy after it is operational.”⁶ No other representations regarding Nik were made in the CFO application or to the zoning board.
5. IDEM issued approval to construct and operate a confined feeding operation (CFO) to Milco on November 19, 2015 (the Approval). Milco received approval to construct a facility located 2625 E 1200 N in Lewisville Indiana (County Line Dairy). County Line Dairy would house 1400 dairy cows. County Line Dairy had not been constructed as of the date of the hearing.
6. County Line Dairy is not permitted to discharge under the Approval.
7. The Petitioner, House of Prayer Ministries d/b/a Harvest Christian Camp, filed its Petition for Administrative Review on December 4, 2015. The Petitioner operates a church ministry and youth camp on its property at 9630 S 25 West, Lewisville Indiana (the Camp). The Camp is located southwest of and within a half-mile upstream of County Line Dairy. The Camp is downstream from some of the fields upon which manure will be land applied. The Petitioner alleges that run off from these fields will flow into Shankatank Creek, which runs through the Camp and will cause harm to the Camp residents and users.
8. The Petitioner identifies the following alleged deficiencies in IDEM’s review of the Approval:

⁴ Exhibit 39.

⁵ Exhibit 8 - CFO/CAFO Application Packet, dated June 9, 2015, page 25.

⁶ Petitioner’s Exhibit 4, Milco’s Response to Petitioner’s Request to Admit Facts, September 21, 2016.

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- a. Milco failed to comply with the disclosure statement requirements in Ind. Code (I.C.) § 13-18-10-1.4.
 - b. Federal permitting requirements were not followed, specifically, (1) the requirement to implement a nutrient management plan (40 CFR 122.42(e)(1)) and (2) the requirement for recordkeeping (40 CFR 122.42(e)(2)).
9. Milco owns and operates a separate facility at 9302 S 275 E, Lewisville Indiana (Milco Dairy). Inspections conducted by either IDEM or U.S. Environmental Protection Agency (EPA) have noted alleged violations at this facility.
 10. IDEM conducted inspections on June 14, 2001; May 31, 2002; August 9, 2002; August 29, 2002; September 11, 2003; and December 29, 2003.
 11. On June 14, 2001, IDEM noted the following alleged violations: lagoon slopes needed to be stabilized with vegetation; silage storage area and stockpile feed waste are showed leaching; vegetation needed to be completed.
 12. On May 31, 2002, IDEM noted that the lagoon had overflowed; there was improper freeboard; berms needed to be stabilized; and run-off from silage storage area needed to be addressed.
 13. IDEM noted the following alleged violations on August 9, 2002: potential leachate migration from silage storage area; and berms continue to need be stabilized through vegetation.
 14. In a follow-up inspection on August 29, 2002, the IDEM inspector noted that Mr. Niessen had seeded the areas needing vegetation, but that vegetation had not been established. Further, the silage storage area needed to be addressed by constructing an earthen berm to preclude potential run-off. It was noted that lagoon markers had not been maintained.
 15. On September 11, 2003, an IDEM inspection revealed that there continued to be problems with leachate run-off from the silage storage area.
 16. An inspection on December 29, 2003 noted leachate run-off from the leachate pad.
 17. The violations were resolved through an Agreed Order between Milco and IDEM⁷, effective July 12, 2004.

⁷ Vreba Hoff Dairy Development, LLC was also a party.

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18. EPA inspected Milco Dairy on December 10, 2003 and noted the same violations that IDEM had previously observed. EPA issued Findings of Violation and Order for Compliance and Request for Information on September 24, 2004 to address the violations.
19. In a February 17, 2012 inspection, IDEM alleged that Milco had extended an existing barn and constructed a roof extension on the center barn without notifying IDEM. Further, it was alleged that Milco was constructing a calf barn without approval. There was no allegation that a release had occurred. These were the acts or omissions noted in the disclosure statement and in Finding of Fact #2.
20. On August 14, 2012, IDEM and Milco entered into an AO resolving these alleged violations. Milco was required to submit the appropriate paperwork to IDEM, but no penalty was assessed. These were the acts or omissions noted in the disclosure statement and in Finding of Fact #2.
21. On August 5, 2014, IDEM conducted an inspection at Milco Dairy and noted storm water management violations and an unpermitted modification to the facility. IDEM and Milco entered into an Agreed Order on July 14, 2015 to address these violations. These were the acts or omissions noted in the disclosure statement and in Finding of Fact #2.
22. At the time the application was submitted, there were no pending administrative, civil, or criminal enforcement actions pending against Milco.
23. The evidentiary hearing was held on October 17 and 18, 2016. The parties filed post-hearing briefs and/or proposed findings of fact, conclusions of law and orders on January 13, 2017.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence

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presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. The issues presented for consideration are:

- (A) Did Milco disclose all responsible parties?
- (B) Did Milco disclose all material violations?
- (C) Did any of the material violations pose a substantial endangerment to human health or the environment?
- (D) Did the CFO approval comply with 40 CFR 122.42 (e) regarding a site-specific nutrient management plan or the record keeping requirements?

Milco complied with the disclosure requirements in I.C. § 13-18-10-1.4.

5. The pertinent portions of I.C. § 13-18-10-1.4 state:

- (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) ...
- (b) Subsection (a):
 - (1) 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
 - (2) 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.
- (c) A responsible party referred to in subsection (a) must make reasonable efforts to provide complete and accurate information to the department in a disclosure statement that includes the following:
 - (1) The name and business address of the responsible party.
 - (2) A description of the responsible party's experience in managing the environmental aspects of the type of facility that will be managed under the permit.

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- (3) A description of all pending administrative, civil, or criminal enforcement actions filed in the United States against the responsible party alleging any acts or omissions that:
 - (A) constitute a material violation of state or federal environmental law; and
 - (B) present a substantial endangerment to human health or the environment.
- (4) ...
- (5) A description of all finally adjudicated or settled administrative, civil, or criminal enforcement actions in the United States resolved against the responsible party within the five (5) years that immediately precede the date of the application involving acts or omissions that:
 - (A) constitute a material violation of federal or state environmental law; and
 - (B) present a substantial endangerment to human health or the environment.
- (6) ...
- (7) Identification of all state, federal, or foreign environmental permits:
 - (A) applied for by the responsible party that were denied; or
 - (B) previously held by the responsible party that were revoked.
- (d) A disclosure statement submitted under subsection (c):
 - (1) must be executed under oath or affirmation; and
 - (2) is subject to the penalty for perjury under I.C. § 35-44.1-2-1.
- (e) The department may investigate and verify the information set forth in a disclosure statement submitted under this section.

(8) “Responsible party” is defined by I.C. § 13-11-2-191(a) as:

"Responsible party", for purposes of I.C. § 13-18-10, means any of the following:

- (1) An applicant.
 - (2) An officer, a corporation director, or a senior management official of any of the following that is an applicant:
 - (A) A corporation.
 - (B) A partnership.
 - (C) A limited liability company.
 - (D) A business association.
- (9) The Petitioner allege that Milco failed to comply with the statute by failing to list Nik Niessen as a responsible party. No evidence was presented that Nik is or ever was an officer or corporation director of Milco Dairy LLC. Petitioner would have prevailed on this issue if it proved that Nik was a “senior management official” *at the time the application was submitted*. If Petitioner had evidence that Nik was acting as the manager for Milco Dairy or that Nik had substantial involvement in the proposed design for County Line Dairy, this could raise questions whether he could be considered a

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senior management official and therefore, a responsible party. However, the Petitioner relies on evidence that, at some future time, Nik would become part owner of Milco and manage the County Line Dairy. The mere fact that Milco made statements regarding Nik becoming a part owner or having some other future role⁸ is not sufficient to support a conclusion that he was a senior management official, and therefore a responsible party. Sufficient evidence that Nik had an active role in management of either the Milco Dairy or the development of the County Line Dairy is necessary. As IDEM pointed out, if, at a later date, Nik becomes an owner or manager of either dairies, Milco is required to notify IDEM.

- (10) I.C. § 13-18-10-1.4(a) requires each responsible party to file a disclosure statement if “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”. Subsection (b) then states that subsection (a) applies only if the acts or omissions present a substantial endangerment to human health or the environment. It is clear that the IDEM allegations and the EPA action were allegations by a state or federal official that the responsible party committed acts or omissions that constituted a material violation of federal environmental law.
- (11) Pursuant to I.C. § 13-18-10-1.4(c)(5)⁹, each responsible party must file a disclosure statement that includes, but is not limited to, the following information: a description of all finally adjudicated or settled administrative, civil, or criminal enforcement actions in the United States resolved against the responsible party within the five (5) years that immediately precede the date of the application involving acts or omissions that constitute a material violation of federal or state environmental law and present a substantial endangerment to human health or the environment.
- (12) Petitioner alleges that Nico and Milly, as responsible parties, did not disclose all of the acts or omissions that constituted a material violation of state or federal environmental law and presented a substantial endangerment to human health or the environment. Nico and Milly did not mention the EPA action or most of the IDEM inspections on their disclosure statement.

⁸ As the Niessens’ son, it would be reasonable to assume that Nik might take a more responsible role in the company. It would be reasonable to assume that a person’s progeny might someday take charge of the parent’s business. However, it would not be wise to consider offspring as responsible parties based only on the fact that they are relatives.

⁹ I.C. § 13-18-10-1.4(c)(3) requires a description of all *pending* administrative, civil, or criminal enforcement actions; there was no evidence presented that there were any pending actions.

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- (13) IDEM argues that because the 2004 IDEM violations were the same as the violations brought by the EPA, IDEM knew of the 2003 EPA violations and making Nico and Milly disclose the 2003 EPA action would be a pointless exercise. This is unpersuasive for two reasons. First, the statute puts the burden of disclosure on the applicant. Second, information regarding how many times a violation has been alleged to have occurred could be relevant to a determination of whether such violations constitute a “substantial endangerment”.
- (14) While the IDEM actions and the 2003 EPA action trigger the requirement for the Niessens to file disclosure statements, they were not required to include a description of the any of these actions in the statement because the statute only requires a description of such actions brought within the five (5) years preceding the application. The application in this case was submitted on June 9, 2015 so a description of any final administrative, civil, or criminal enforcement actions brought after June 8, 2010 must be included in the disclosure statement.
- (15) The application itself does not limit the disclosure to the previous five (5) years. I.C. § 13-18-10-2 states that an applicant shall use the application form that IDEM provides. There appears to be a conflict then between what information must be submitted with the application and I.C. § 13-18-10-1.4. Under the rules of statutory construction, however, it is clear that the more specific statute will govern over the more general statute. “Similarly, where one statute deals with a subject in general terms and another statute deals with a part of the same subject in a more detailed or specific manner, then the two should be **harmonized**, if possible; but if they are in **irreconcilable conflict** then the more detailed will **prevail** as to the **subject matter** it covers. *State ex rel. Todd v. Hatcher*, 158 Ind. App. 144, 301 N.E.2d 766 (1973); *Chaffin, supra*; *Citizens Gas & Coke Utility v. Sloan*, 136 Ind. App. 297, 196 N.E.2d 290 (1964), *reh. den.*, 136 Ind. App. 297, 197 N.E.2d 312.” *Indiana Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823, 833 (Ind. Ct. App. 1982); *see also State v. Greenwald*, 116 N.E. 296 (Ind. 1917). Therefore, the five (5) year limit in I.C. § 13-18-10-1.4(c)(5), as the more specific statute, governs.
- (16) The only actions that fall within this time frame are the 2012 and 2015 enforcement actions brought by IDEM against Milco. The disclosure statement includes both of these actions. The Neissens’ disclosure statement concludes that neither of these actions present a substantial endangerment to human health or the environment as neither resulted in or caused a release of manure to the environment.

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- (17) Greg Bright, Petitioner's expert witness, concluded that some of the violations presented a substantial endangerment to human health or the environment. He based this conclusion on the violations that occurred between 2002 and 2006. He assumed a release of manure had occurred based on the information in the inspection reports. However, the IDEM inspector did not indicate that material had left the Dairy or entered into any water of the state. Neither water nor soil samples were taken. There was no indication that any material migrated off-site. In other words, Petitioner has no evidence of any actual harm to human health or the environment.
- (18) Also, as none of the violations that occurred before 2010 need to be included in the disclosure statement, Mr. Bright's opinion regarding whether these violations presented a substantial endangerment to human health or the environment is irrelevant.
- (19) None of the alleged violations in the last five (5) years involved anything other than paperwork violations, thus, decreasing the possibility of a substantial endangerment to human health or the environment.
- (20) Petitioner has failed to present substantial evidence that Milco failed to comply with the disclosure requirements of I.C. § 13-18-10-1.4.

The CFO approval complied with 40 CFR 122.42 (e) regarding a site-specific nutrient management plan or the record keeping requirements.

- (21) Last, Petitioner argues that the CFO approval should, but does not, require compliance with 40 CFR 122.42(e) regarding a site-specific nutrient management plan and the record keeping requirements.
- (22) 40 CFR 122.42 applies to specific categories of NPDES permits. Subsection (e) specifically applies to CAFOs with NPDES permits. The Approval for County Line Dairy is not an NPDES permit. As County Line Dairy is a zero discharge facility, an NPDES permit was not necessary. Therefore, 40 CFR 122.42 does not apply.
- (23) Furthermore, the Approval states that the owner/operator must comply with 327 IAC 19. 327 IAC 19-11-1(a) states: "All CFOs that are defined as concentrated animal feeding operations (CAFOs) in 40 CFR 122.23(b)(2) and all CAFOs with a NPDES permit must meet the storm water requirements in 40 CFR 122.23(e) and 40 CFR 122.42(e)(1) through 40 CFR 122.42(e)(2)." County Line Dairy is approved to house 1,400 dairy cows.

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Under 40 CFR 122.23(b)(4)(iii), a CAFO with more than 700 dairy cows is considered a large confined animal feeding operation.

(24) As County Line Dairy's Approval requires Milco to comply with 40 CFR 122.23, Petitioner's argument fails.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED judgment is entered in favor of the Indiana Department of Environmental Management and Milco Dairy LLC.

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 Commissioner 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. 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 27th day of February, 2017 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge