

**BEING AN ORDINANCE TO AMEND THE TEXT OF THE DELAWARE COUNTY  
COMPREHENSIVE ZONING ORDINANCE REGARDING CONFINED FEEDING OPERATIONS  
AND CONCENTRATED ANIMAL FEEDING OPERATIONS**

**WHEREAS**, the State enabling act for planning and zoning empowers the Board of Commissioners of Delaware County, Indiana to adopt a zoning ordinance and also provides for amendments to said ordinance as deemed necessary from time to time; and

**WHEREAS**, a zoning ordinance may, in each district, regulate how real property is developed, maintained, and used; and

**WHEREAS**, agriculture remains an essential component of the Delaware County economy and, through technology and market trends, agricultural activities continue to evolve; and

**WHEREAS**, there is a need to develop additional requirements applicable to animal feeding operations of a certain size and intensity to regulate the location to achieve and secure the benefits and to minimize the impacts; and

**WHEREAS**, the Board of Commissioners of Delaware County, Indiana, has given reasonable regard to the comprehensive plan; current conditions and the character of current structures and uses in each district; the most desirable use for which the land in each district is adapted; the conservation of property values throughout the jurisdiction; and responsible growth and development.

**NOW, THEREFORE, BE IT ORDAINED** by the Board of Commissioners of Delaware County, Indiana, that the text of the Delaware County Comprehensive Zoning Ordinance shall be amended as follows:

**SECTION 1.** Amend Article XXXIII, Section 2 TERMS AND MEANING by alphabetically inserting the following new definitions, with appropriate recodification:

**Animal Feeding Operation (AFO):**

A lot or facility, other than an aquatic animal production facility, where all of the following conditions are met: 1) animals, other than aquatic animals, have been, are, or will be stabled or confined and fed or maintained for a total of forty-five (45) days or more in any twelve (12) month period; and 2) crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over at least fifty percent (50%) of the lot or facility.

[State definition per 327 IAC 19-2-3]

**Animal Unit (AU):**

A unit of measurement used to determine separation distances and procedures applicable to CAFO operations with 20,000 or more animals units, based on the total number of single animals or combination of animal types and sizes which are fed, maintained, or stabled at a location/site/property, as follows:

Animal Type	Animal Unit
Mature dairy cow	1.4
Beef cattle or heifer	1.0
Swine over 55 pounds	0.4
Swine under 55 pounds	0.1
Ducks (non-liquid manure systems)	0.03
Ducks (liquid manure systems)	0.2
Chickens (liquid manure systems)	0.03
Chickens (non-liquid manure systems)	0.01
Veal calves	1.0
Horses	2.0
Sheep or lambs	0.1
Turkeys	0.02
Animals not listed – use average weight of the animal in pounds and divide by 1,000 to arrive at the Animal Unit	

[Animal Units derived by dividing 1000 by the number and type of animals cited in the CAFO definition]

**Child Care Center:**

A nonresidential building, licensed by the State of Indiana, where at least one (1) child receives child care from a provider as follows: while unattended by a parent, legal guardian or custodian; for regular compensation; and for more than four (4) hours but less than twenty-four (24) hours in each of ten (10) consecutive days per year, excluding intervening Saturdays, Sundays and holidays. Also known as a day care center.

**Concentrated Animal Feeding Operation (CAFO):**

An animal feeding operation that stables or confines at least as many as or more than the numbers of animals specified in any of the following categories:

- 1) 700 mature dairy cows, whether milked or dry;
- 2) 1,000 veal calves;
- 3) 1,000 cattle, other than mature dairy cows and veal calves, cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
- 4) 2,500 swine each weighing 55 pounds or more;
- 5) 10,000 swine each weighing less than 55 pounds;
- 6) 500 horses;
- 7) 10,000 sheep or lambs;
- 8) 55,000 turkeys;
- 9) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
- 10) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- 11) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
- 12) 30,000 ducks, if the AFO uses other than a liquid manure handling system; or
- 13) 5,000 ducks, if the AFO uses a liquid manure handling system.

[Federal definition 40 CFR 122.23]

**Confined Feeding:**

Confined feeding for purposes of this Ordinance means the confined feeding of animals for food, fur, or pleasure purposes in lots, pens, ponds, sheds, or buildings where:

- 1) animals are confined, fed, and maintained for at least forty-five (45) days during any twelve (12) month period; and

- 2) ground cover or vegetation is not sustained over at least fifty percent (50%) of the animal confinement area.

The term does not include the following: 1) a livestock market where animals are assembled from at least two sources to be publicly auctioned or privately sold on a commission basis and that is under state or federal supervision; and 2) a livestock sale barn or auction market where animals are kept for not more than ten (10) days.

[State definition 327 IAC 19-2-6]

**Confined Feeding Operation (CFO):**

Confined feeding operation for purposes of this Ordinance means any:

- 1) confined feeding of at least:
  - a. three hundred (300) cattle;
  - b. six hundred (600) swine or sheep;
  - c. thirty thousand (30,000) fowl; or
  - d. five hundred (500) horses.
- 2) animal feeding operation electing to be subject to IC 13-18-10; or
- 3) animal feeding operation that is causing a violation of:
  - a. water pollution control laws;
  - b. any rules of the water pollution control board; or
  - c. IC 13-18-10.

[State definition 327-IAC 19-2-7]

The term CFO is intended to include all of the production area involved in the operation. Two or more operations under common ownership are considered to be a single operation for purposes of determining the number of animals at an operation if they adjoin each other or if they use a common area or system for the disposal of waste.

**Drainage Inlet:**

Any surface opening to an underground Regulated Drain Tile system that drains to surface waters of the state; the term includes water and sediment control basins.

**Existing CFO/CAFO:**

A CFO or a CAFO is considered to be existing for purposes of this ordinance if the CFO's or CAFO's confinement structure(s) or manure storage facility(s) have been constructed. An existing CFO or CAFO is considered a conforming use that may have nonconforming characteristics such as setbacks less than required by this ordinance.

**Expansion of an Existing CFO/CAFO:**

A term meaning increasing the number of animals beyond the number of animals allowed per a CFO or CAFO permit issued by the Indiana Department of Environmental Management. Expansion of a CFO or CAFO in a rural residential area is subject to the requirements of Article XXXI, Section 12. Expansion of a CFO or CAFO with nonconforming characteristics in a rural agricultural area may occur provided such expansion does not further encroach upon the nonconforming characteristic(s).

**Floodplain:**

The channel proper and the areas adjoining any wetland, lake or watercourse, which have been, or hereafter may be covered by the regulatory flood. The flood plain includes both the floodway and the floodway fringe districts as set forth in the Floodplain Management Ordinance for Delaware County, Indiana. The regulatory flood is a flood having a one percent probability of being equaled or exceeded in any given year, as calculated

by a method and procedure acceptable to and approved by the Indiana Department of Natural Resources and the Federal Emergency Management Agency.

**Institution for Human Care:** Residential facilities that provide on-site living and/or medical assistance for those unable to independently care for themselves such as a nursing home, an assisted living facility, a convalescent facility, or similar facility.

**Manure Storage Facility:**

Manure storage facility means any:

- 1) Pad;
- 2) Pit;
- 3) Pond;
- 4) Lagoon;
- 5) Tank;
- 6) Building; or
- 7) Manure containment area;

used to store or treat manure, including any portions of buildings used specifically for manure storage or treatment.

[State definition 327 IAC 19-2-28]

**Private School:** An accredited nonpublic school, private or parochial, that is determined to be in compliance with the standards for the recognition of nonpublic schools as set by the Indiana State Board of Education.

**Production Area:**

Production area means that part of an animal feeding operation that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes, but is not limited to, open lots, housed lots, feedlots, confinement houses, stall barns, free stall barn, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes, but is not limited to, lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes, but is not limited to, feed silos, silage bunkers, and bedding materials. The waste containment area includes, but is not limited to, settling basins and areas within berms and diversions which separate uncontaminated storm water. The term includes any egg washing or egg processing facility, and any area used in the storage, handling, treatment or disposal of mortalities.

[State definition 327 IAC 19-2-34]

**Public Use Recreational Area:** A use of land owned by any federal, state or local governmental entity, or a nonprofit entity, which is operated to attract the public and allow them to congregate for significant periods of time for recreational purposes such as parks, campgrounds, and nature preserves. Road right-of-way, parking areas, recreational trails and any other area used by the public as a passageway or temporary parking area is not considered a public use recreational area.

**Public Water Supply Well:**

Any well that provides water to the public through a water distribution system that serves at least twenty-five (25) persons per day for drinking, domestic use or other purposes, or that has at least fifteen (15) service connections.

[State definition 327 IAC 19-2-36]

**Regulated Drain Tile:** A drainage tile under the jurisdiction of the Delaware County Drainage Board; also known as a legal drain tile.

**Rural Agricultural Area:** Any area classified in the F Farming Zone where there are thirty-two (32) or fewer dwelling units in a circular area equal to a square mile as measured from the center point of the production area with a radius of 2,979 feet. Rural agriculture areas shall consist of two levels as follows: Level 1 shall be those areas with 16 or fewer dwelling units within the square mile area described herein; and Level 2 shall be those areas with 17 to 32 dwelling units within the square mile area described herein.

**Rural Residential Area:** Any area classified in the F Farming Zone where there are 33 or more dwelling units in a circular area equal to a square mile as measured from the center point of the production area with a radius of 2,979 feet.

**Sensitive Area:**

Sites where conditions pose a specific water quality threat to one or more of the following:

- Public water supply wells
- Wellhead protection areas
- Drinking water supply reservoirs
- Areas requiring special protection such as wetlands (except for wetlands constructed for manure management), Karst terrain, critical habitat of an endangered species, public use recreational areas.

**Surface Waters of the State:**

A lake, reservoir, marsh, waterway or other water under public ownership, jurisdiction or lease.

**SECTION 2.** That Article XII, F Farming Zone, Section 1 Permitted Uses, Items 1 and 2 shall be amended by inserting new language as underlined below and substituting “aquatic animals” for “aquariums”, and by inserting a new Item 3, with appropriate recodification, to read as follows:

1. Single family dwellings, subject to reciprocal separation distances as applicable, as set forth in Article XII, Section 9(C) Land Use Separation Distance Requirements.
2. Agricultural Uses including: field crops; dairies; tree crops; flower and vegetable gardening; nurseries; orchards; horse farms and farms (that are not CFO’s or CAFO’s) for the breeding, raising and sale of chickens, hogs, cattle, turkeys, sheep, aquatic animals or other animals; breeding, boarding or sale of dogs. All such animal uses (that are not CFO’s or CAFO’s) and buildings or premises shall be at least two hundred (200) feet from a dwelling (other than a farm dwelling), school, church, hospital or institution for human care.
3. Confined feeding operations (CFO’s) and concentrated animal feeding operations (CAFO’s) that are located in rural agricultural areas subject to the requirements set forth herein in Article XII, Section 9.

**SECTION 3.** That Article XII, F Farming Zone, Section 2 Special Uses shall be amended by inserting a new Item 14 to read as follows:

14. Confined feeding operations (CFO’s) and concentrated animal feeding operations (CAFO) located in rural residential areas, provided they comply with the requirements set forth in Article XXXI, Section 12.

**SECTION 4.** That Article XII, F Farming Zone shall be amended by inserting a new Section 9 as follows:

**Section 9. CFO/CAFO REQUIREMENTS**

- A Purpose and Intent:** The purpose of these requirements is to acknowledge that agriculture remains an essential component of the Delaware County economy and that, through technology and market trends, agricultural activities have evolved into efficient agricultural businesses. These requirements apply to any new Confined Feeding Operation (CFO) or Concentrated Animal Feeding Operation (CAFO) and to any expansion of an existing CFO or CAFO and are intended to minimize the impact of such feeding operations on surrounding land uses and the environment. These requirements are in addition to the rules, regulations and procedures set forth by the Indiana Department of Environmental Management (IDEM), the United States Environmental Protection Agency (USEPA), or any other agency or board designated at the federal, state or local level to monitor or regulate confined feeding operations. In the case of conflicting requirements and/or regulations, the more restrictive shall prevail. Compliance with these requirements shall be maintained throughout the life of the operation and prior to the proper closure of the operation. To ensure that compliance with the requirements set forth herein is maintained, annual inspections will be conducted by the Plan Commission Office and the Health Department.
- B Determination of Rural Agricultural Area:** Prior to making application for local building and improvement location permits, the applicant shall consult with the Plan Commission Office to determine if the location of a proposed CFO or CAFO is in a rural agricultural area or a rural residential area. If it is determined to be in a rural agricultural area, the applicant may proceed in accordance with this Section. If it is determined to be in a rural residential area, the applicant must proceed in accordance with Article XXXI, Sections 2 and 12 for a special use approval from the Delaware-Muncie Metropolitan Board of Zoning Appeals. In making the determination, the Plan Commission Office shall consider all dwelling units regardless of jurisdictional boundaries using the best available data.
- C Permitting Requirements:** Local permits (which may include drainage, driveway, septic system, wells, stormwater quality, building, electrical) shall be required as applicable for any new CFO or CAFO and for the expansion of an existing CFO or CAFO. An application for local building and improvement location permits shall be submitted to the Building Commissioner and Zoning Administrator and shall include the following information. All information must be submitted and the proposed operation found to be in compliance with these requirements in order for permits to be issued.
1. An overall site plan map that includes the boundaries of the property, a site layout of the production area, other buildings and structures, driveways, on-site and off-site parking and circulation patterns and the general drainage plan.
  2. The maximum number and type of animals to be confined.
  3. Manure management plan as submitted to the Indiana Department of Environmental Management, including best management practices, if applicable.
  4. Emergency spill response plan as submitted to the Indiana Department of Environmental Management.
  5. A signed affidavit stating that the proposed operator has no outstanding or unresolved violations relating to animal feeding operations nor is there a history of recurring violations, as measured over the last five (5) years, with the Indiana Department of Environmental Management, the U.S. EPA, or other governmental agency relating to animal feeding operations.

6. A copy of all necessary and applicable state and/or federal approvals from the Indiana Department of Environmental Management, the U.S. Environmental Protection Agency, or other applicable agency dealing with animal feeding operations.
7. For CAFO operations with lagoon systems only, a performance bond or other acceptable surety in favor of the Delaware County Commissioners, which shall remain in effect for the life of the operation to ensure proper closure of the manure storage structure and/or to prevent discharge contamination into surface waters of the state, in an amount equal to \$1,500 for each 100,000 gallons of waste storage capacity.
8. Stamped envelopes addressed to owners of all property located in the applicable separation distance area as set forth in the table below. The Building Commissioner's address shall be the return address.
9. A general area map showing compliance with the setbacks set forth in this Section. Delaware County's GIS information is available and may be used as the best available data source for showing compliance. GIS information from surrounding counties may also be available and used or if not available, information contained on the state GIS site known as [www.indianamap.org](http://www.indianamap.org) may be used.
10. Copies of any signed and notarized affidavits waiving a setback requirement.
11. A copy of the routing plan, showing the roads that will regularly be used for the transport of animals, and the approval of the routing plan from the Delaware County Engineering Department.

**D Land Use Separation Distance Requirements:** The production area of a Confined Feeding Operation and/or a Concentrated Animal Feeding Operation shall maintain, at a minimum, the following separation distances with all distances measured in feet:

	Residence (not on CFO/ CAFO site, not owned/ occupied by applicant)	Residence Zone	Developed Platted Subdivision (homes on more than 50% of lots )	Public/ Private School (not home or temporary school)	Corporate Limits of any City or Town	Public Use Recreation Area	Hospital, Institution for Human Care, Child Care Centers	Church/ Religious Institution
Level 1 Rural Ag Area	CFO - 500 CAFO - 1,000	1,320	1,320	5,280	< 5000 pop. - 2,640 >5000 pop. - 5,280	1,320	5,280	1,320
Level 2 Rural Ag Area	CFO - 660 CAFO - 1,320	1,320	1,320	5,280	<5000 pop. - 2,640 >5000 pop. - 5,280	1,320	5,280	1,320

**a. Measurement of Distances:** Separation distances shall be measured as the straight line distance from the nearest point of a building or structure in the production area of a CFO or CAFO operation to the nearest point of a structure containing a residence, school, hospital, institution for human care, or church and to the nearest boundary of a residence zone, platted subdivision, or corporate limit line. Only structures (including structures for which permits have been issued) and boundaries in existence as of the date of the permit application shall be used to establish the required separation distances. An owner of property may waive a setback requirement with a written, signed and notarized affidavit.

b. **Additional Requirements for Operations with 20,000 or more animals units:** For CAFO's involving 20,000 or more animals units located in a Level 1 Rural Agricultural Area, the Land Use Separation Distance Requirements for Level 2 shall apply. For CAFO's involving 20,000 or more animal units located in a Level 2 Rural Agricultural Area, the operation will be classified as a special use requiring approval from the Delaware-Muncie Metropolitan Board of Zoning Appeals as set forth in Article XXXI, Section 12. For CAFO's involving 20,000 or more animal units located in either Level 1 or Level 2, an odor abatement measure with proven effectiveness shall be required in addition to a shelterbelt.

c. **Protection and Applicability of Separation Distances:** No permits for new residential, public or private development shall be issued during the CFO/CAFO permit process that would adversely affect compliance of the CFO or CAFO operation. A CFO or CAFO has the responsibility of declaring its location to the Building Commissioner and Plan Commission once their state and/or local permit process starts. A local CFO or CAFO permit shall remain in effect for 1 year, however, the permittee may request an extension of time from the Building Commissioner prior to the 1 year expiration up to a maximum of 5 years from the date of the original permit. Separation distances shall be reciprocal. Notice that a CFO or CAFO permit application has been made shall be sent by first class mail to all property owners of record whose property would be subject to the reciprocal separation distances. Once a CFO or CAFO permit is issued under this Section, no permit shall be issued for a residence, school, hospital, institution for human care or church and no approvals shall be given to a platted subdivision located in the separation distances unless the owner signs, and records as a deed or plat restriction, a waiver, notice and acknowledgement of CFO/CAFO agricultural activity.

E **Environmental Separation Requirements for Sensitive Areas:** The production area of a Confined Feeding Operation and/ or a Concentrated Animal Feeding Operation shall maintain, at a minimum, the following separation distances, based on the waste management system:

ENVIRONMENTAL FEATURE/SENSITIVE AREAS	LAGOON SYSTEM	NON-LAGOON SYSTEM
Public Water Supply Wells, Rivers (White and Mississinewa) and Prairie Creek Reservoir	2 miles	1 mile
Surface Waters of the State, Regulated Open Drains (ditches, waterways, wetlands)	5,280 ft.	300 ft.
100 Year Floodplain	5,280 ft.	300 ft.
Drainage Inlets & Off-site Water Wells	1,320 ft.	300 ft.
On-site Water Wells	400 ft.	100 ft.
Regulated Drain Tiles	400 ft.	100 ft.

For purposes of this ordinance and the above setbacks, a lagoon shall mean an uncovered open-air liquid manure storage facility such as a pit, pond, tank or earthen berm containment area used to store or treat manure as defined in 327 IAC 19-2-25.

F **Setbacks:** The production area of a Confined Feeding Operation and/or a Concentrated Animal Feeding Operation shall maintain the following setbacks:

- a. 200' from any public road right-of-way, existing or proposed, whichever is greater.
- b. 400' from a side or rear property line.



c. 1 mile from any other CAFO production area.

**F Lot Area:** The minimum lot size on which confined feeding operations and concentrated animal feeding operations shall be permitted is 40 acres.

**H Transportation, Public Road Access, Parking and Loading:** A minimum driveway width and design specifications for entrances to CFO/CAFO sites shall be set by the County Engineer to prevent damage to the public road on which the entrance is situated. For the driveway approach, there shall be at least 20 feet of hard surface from the public road pavement leading into the site. A suitable truck turn-around area shall be provided on-site. The turn-around area shall be an all-truck turn-around so that vehicles do not have to back into the public road, through T-turns or a turning area with the proper radius to accommodate the vehicles. The entire drive and turn-around area must have a surface to minimize dust and to avoid caking of mud on truck wheels. If trucks will be parked or stored on the site overnight or long-term, there shall be a parking space for each such truck and the parking space(s) must not reduce or impede the turn-around area. A routing plan, showing the roads that will regularly be used for the transport of animals, shall be submitted and approved by the County Engineering Department.

**I Shelterbelt Requirements:** Each CAFO shall be required to install and maintain a shelterbelt downwind of the operation and adjacent to any exhaust fans. The shelterbelt shall be located at least fifty (50) feet outside of the production area or 10 times the exhaust fan diameter, whichever is greater. The shelterbelt shall be fully within the property line of the subject property. The shelterbelt shall consist of a minimum of 2 rows of shrubs (located closest to the production area) followed by 2 rows of shade trees and then 2 rows of evergreen trees. If the owner of the CAFO maintains a forested buffer of adjacent land at least 150 feet in depth to the east of the operation, it may be used as the shelterbelt. Trees shall be a minimum of 6 feet tall at planting and shrubs shall have a minimum diameter of 12 inches.

The shelterbelt shall consist of the following types of plants and planted in the following manner:

1. Shrubs. Two or more species of shrubs shall be planted at 1 shrub for every 10 feet of shelterbelt distance per row, all equally spaced. Shrub rows shall be separated by 6 feet with the shrubs staggered from the shrubs in the adjacent rows.
2. Shade trees (deciduous trees with an average mature height over 45 feet): Two or more species of shade trees shall be planted at 1 tree for every 30 feet of shelterbelt per row, all equally spaced.
3. Evergreen trees. Two or more species of evergreen trees shall be planted at 1 tree for every 30 feet of shelterbelt distance per row, all equally spaced.

Each row of trees shall be separated by 30 feet with the trees staggered from the trees in neighboring rows.

All required shelterbelt plantings shall be installed prior to the commencement of operations. If it is not possible to install the required plantings due to weather conditions or other circumstances, all plantings shall be installed within eight (8) months of the first occupancy of the buildings on the site. Surety may be required to ensure installation, such as, but not limited to, bonds or personal guaranties.

The shelterbelt requirement is intended to be an odor abatement measure and there may be sites where the separation distances from the production area to a residence(s), or other listed land use, exceed the required distance such that the shelterbelt's purpose is achieved through distance. In these instances, the applicant may request a variance from this requirement from the Delaware-Muncie Metropolitan Board of Zoning Appeals, under established rules and procedures, with the increased distance being an

acknowledged hardship.

**J Animal Mortalities:** Animal landfills shall not be permitted. All mortalities shall be disposed of in accordance with the requirements of the State of Indiana Board of Animal Health.

**K Manure Management:** All new manure storage facilities for a CFO/CAFO must be designed, constructed and maintained with a combined storage capacity of at least 360 days storage for manure and, if applicable, the expected rainfall and run-off from a 100 year, 24 hour precipitation event that falls on the drainage area around a liquid manure storage structure (i.e. lagoon, pond). All confined feeding operations for poultry shall use a dry manure handling system.

The following manure application requirements shall apply to any manure derived from CFO's or CAFO's within Delaware County, Indiana, or to be applied to land within Delaware County, Indiana.

1. Any manure that is to be applied to land within Delaware County, Indiana shall be covered and bermed within 72 hours of delivery.
2. All manure management requirements of the Indiana Department of Environmental Management and the Office of the Indiana State Chemist shall be followed.

Satellite manure storage facilities, which are manure storage structures not located at a livestock or poultry production area, shall meet the same Land Use Separation Distance Requirements and Environmental Separation Requirements that apply to a CFO or CAFO as set forth herein.

**L Manure Storage Facility Closure:**

The owner/operator of confined feeding or concentrated animal feeding operations that plans to close or discontinue use of a manure storage facility must comply with the requirements set forth herein in addition to all applicable state requirements. The following items shall be filed with the Plan Commission, the Delaware County Health Department, and the Delaware County Zoning Administrator:

1. Written notice of the anticipated date to cease operation shall be forwarded not less than 60 days prior to closure. At this time, the Commission, the Health Department and/or the Zoning Administrator should forward any local concerns dealing with closure to IDEM.
2. A copy of the certification submitted by the owner/operator to IDEM that states compliance with all state requirements for the closure or discontinued use of a manure storage structure, a copy of any additional closure requirements imposed on the owner/operator by the state, and a copy of the letter of confirmation from the Indiana Department of Environmental Management verifying that the state requirements for closure have been met.

Within 180 days of the notice to discontinue use of the manure storage structure, the owner/ operator shall start the process of manure removal and within 365 days of the notice, shall complete the process and meet the IDEM requirement of no remaining potential to discharge. If, at the end of the 365 days, the terms of Item 2 above have not been met, the Delaware County Commissioners may utilize the bond/surety to accomplish proper closure of the manure storage structure. Additional costs in excess of the bond/surety, incurred by the Delaware County Commissioners, shall be assessed as a lien against the property.

**SECTION 5.** That Article XXXI, SPECIAL USES, shall be amended and supplemented by inserting a new Section 12 as follows:

## ARTICLE XXXI

### Section 12 RURAL RESIDENTIAL CONFINED FEEDING OPERATIONS AND CONCENTRATED ANIMAL FEEDING OPERATIONS

#### A DEFINITION

A confined feeding operation (CFO) or concentrated animal feeding operation (CAFO) that is proposed to be located in a rural residential area as defined in this ordinance.

#### B ZONES IN WHICH PERMITTED

A CFO or CAFO may be permitted in the F Farming Zone subject to the determination of the Delaware-Muncie Metropolitan Board of Zoning Appeals.

#### C APPLICATION

In addition to the information required on the standard application for appeal, the following information shall be supplied and may be indicated on the standard application map where applicable if it is of adequate size and scale:

1. An overall site plan map that includes the boundaries of the property, a site layout of the production area, other buildings and structures, driveways, on-site and off-site parking and circulation patterns and the general drainage plan.
2. The maximum number and type of animals to be confined.
3. Manure management plan as submitted to the Indiana Department of Environmental Management, including best management practices, if applicable.
4. Emergency spill response plan as submitted to the Indiana Department of Environmental Management.
5. A signed affidavit stating that the proposed operator has no outstanding or unresolved violations relating to animal feeding operations nor is there a history of recurring violations, as measured over the last five (5) years, with the Indiana Department of Environmental Management, the U.S. EPA, or other governmental agency relating to animal feeding operations.
6. A copy of all necessary and applicable state and/or federal approvals from the Indiana Department of Environmental Management, the U.S. Environmental Protection Agency, or other applicable agency dealing with animal feeding operations.
7. Stamped envelopes addressed to owners of all property located in the applicable separation distance area as set forth in the table below. The Building Commissioner's address shall be the return address.
8. A general area map showing compliance with the setbacks set forth in this Section. Delaware County's GIS information is available and may be used as the best available data source for showing compliance. GIS information from surrounding counties may also be available and used or if not available, information contained on the state GIS site known as [www.indianamap.org](http://www.indianamap.org) may be used.
9. Copies of any signed and notarized affidavits waiving a setback requirement.
10. A copy of the routing plan, showing the roads that will regularly be used for the transport of animals, and a copy of the approval from the Delaware County Engineering Department.

The Plan Commission or the Board of Zoning Appeals may require additional information as deemed necessary to determine compliance with the standards set forth herein and the general standards for special uses set forth in Article XXXI, Section 2.

## D STANDARDS

Any proposed CFO or CAFO facility shall meet the following standards and shall continue to meet such standards throughout the life of the operation.

1. **Land Use Separation Distance Requirements:** The production area of a Confined Feeding Operation and/or a Concentrated Animal Feeding Operation shall maintain, at a minimum, the following separation distances with all distances measured in feet:

Residence (not on CFO/CAFO site, not owned/occupied by applicant)	Residence Zone	Platted Subdivision	Public/Private School (not home or temporary school)	Corporate Limits of any City or Town	Public Use Recreation Area	Hospital, Institution for Human Care, Child Care Centers	Church/Religious Institution
CFO - 750	2,640	2,640	5,280	5,280	1,320	5,280	1,320
CAFO - 1,500							

**a. Measurement of Distances:** Separation distances shall be measured as the straight line distance from the nearest point of a building or structure in the production area of a CFO or CAFO operation to the nearest point of a structure containing a residence, school, hospital, institution for human care, or church and to the nearest boundary of a residence zone, platted subdivision, or corporate limit line. Only structures (including structures for which permits have been issued) and boundaries in existence as of the date of the permit application shall be used to establish the required separation distances. An owner of property may waive a setback requirement with a written, signed and notarized affidavit.

**b. Protection and Applicability of Separation Distances:** No permits for new residential, public or private development shall be issued during the CFO/CAFO permit process that would adversely affect compliance of the CFO or CAFO operation. A CFO or CAFO has the responsibility of declaring its location to the Building Commissioner and Plan Commission once their state and/or local permit process starts. A local CFO or CAFO permit shall remain in effect for 1 year, however, the permittee may request an extension of time from the Building Commissioner prior to the 1 year expiration up to a maximum of 5 years from the date of the original permit. Separation distances shall be reciprocal. Notice that a CFO or CAFO permit application has been made shall be sent by first class mail to all property owners of record whose property would be subject to the reciprocal separation distances. Once a CFO or CAFO permit is issued under this Section, no permit shall be issued for a residence, school, hospital, institution for human care or church and no approvals shall be given to a platted subdivision located in the separation distances unless the owner signs, and records as a deed or plat restriction, a waiver, notice and acknowledgement of CFO/CAFO agricultural activity.

2. **Environmental Separation Requirements for Sensitive Areas:** The production area of a Confined Feeding Operation and/ or a Concentrated Animal Feeding Operation shall maintain, at a minimum, the following separation distances, based on the waste management system:

ENVIRONMENTAL FEATURE/SENSITIVE AREAS	LAGOON SYSTEM	NON-LAGOON SYSTEM
Public Water Supply Wells, Rivers (White and Mississinewa) and Prairie Creek Reservoir	2 miles	1 mile
Surface Waters of the State, Regulated Open Drains (ditches, waterways, wetlands)	5,280 ft.	300 ft.
100 Year Floodplain	5,280 ft.	300 ft.
Drainage Inlets & Off-site Water Wells	1,320 ft.	300 ft.
On-site Water Wells	400 ft.	100 ft.
Regulated Drain Tiles	400 ft.	100 ft.

For purposes of this ordinance and the above setbacks, a lagoon shall mean an uncovered open-air liquid manure storage facility such as a pit, pond, tank or earthen berm containment area used to store or treat manure as defined in 327 IAC 19-2-25.

3. **Setbacks:** The production area of a Confined Feeding Operation and/or a Concentrated Animal Feeding Operation shall maintain the following setbacks:
  - a. 200' from any public road right-of-way, existing or proposed, whichever is greater.
  - b. 400' from a side or rear property line.
  - c. 1 mile from any other CAFO production area.
  
4. **Lot Area:** The minimum lot size on which confined feeding operations and concentrated animal feeding operations shall be permitted is 40 acres.
  
5. **Transportation, Public Road Access, Parking and Loading:** A minimum driveway width and design specifications for entrances to CFO/CAFO sites shall be set by the County Engineer to prevent damage to the public road on which the entrance is situated. For the driveway approach, there shall be at least 20 feet of hard surface from the public road pavement leading into the site. A suitable truck turn-around area shall be provided on-site. The turn-around area shall be an all-truck turn-around so that vehicles do not have to back into the public road, through T-turns or a turning area with the proper radius to accommodate the vehicles. The entire drive and turn-around area must have a surface to minimize dust and to avoid caking of mud on truck wheels. If trucks will be parked or stored on the site overnight or long-term, there shall be a parking space for each such truck and the parking space(s) must not reduce or impede the turn-around area. A routing plan, showing the roads that will regularly be used for the transport of animals, shall be submitted and approved by the County Engineering Department.
  
6. **Shelterbelt Requirements:** Each CAFO shall be required to install and maintain a shelterbelt downwind of the operation and adjacent to any exhaust fans. The shelterbelt shall be located at least fifty (50) feet outside of the production area or 10 times the exhaust fan diameter, whichever is greater. The shelterbelt shall be fully within the property line of the subject property. The shelterbelt shall consist of a minimum of 2 rows of shrubs (located closest to the production area) followed by 2 rows of shade trees and then 2 rows of evergreen trees. If the owner of the CFO or CAFO maintains a forested buffer of adjacent land at least 150 feet in depth to the east of the operation, it may be used as the shelterbelt. Trees shall be a minimum of 6 feet tall at planting and shrubs shall have a minimum diameter of 12 inches.

The shelterbelt shall consist of the following types of plants and be planted in the following manner:

- a. Shrubs. Two or more species of shrubs shall be planted at 1 shrub for every 10 feet of shelterbelt distance per row, all equally spaced. Shrub rows shall be separated by 6 feet with the shrubs staggered from the shrubs in the adjacent rows.
- b. Shade trees (deciduous trees with an average mature height over 45 feet): Two or more species of shade trees shall be planted at 1 tree for every 30 feet of shelterbelt per row, all equally spaced.
- c. Evergreen trees. Two or more species of evergreen trees shall be planted at 1 tree for every 30 feet of shelterbelt distance per row, all equally spaced.

Each row of trees shall be separated by 30 feet with the trees staggered from the trees in neighboring rows.

All required shelterbelt plantings shall be installed prior to the commencement of operations. If it is not possible to install the required plantings due to weather conditions or other circumstances, all plantings shall be installed within eight (8) months of the first occupancy of the buildings on the site. Surety may be required to ensure installation, such as, but not limited to, bonds or personal guaranties.

For CAFO's involving 20,000 or more animal units, an odor abatement measure with proven effectiveness shall be required in addition to a shelterbelt.

7. **Animal Mortalities:** Animal landfills shall not be permitted. All mortalities shall be disposed of in accordance with the requirements of the State of Indiana Board of Animal Health.
8. **Manure Management:** All new manure storage facilities for a CFO/CAFO must be designed, constructed and maintained with a combined storage capacity of at least 360 days storage for manure and, if applicable, the expected rainfall and run-off from a 100 year, 24 hour precipitation event that falls on the drainage area around a liquid manure storage structure (i.e. lagoon, pond). All confined feeding operations for poultry shall use a dry manure handling system.

The following manure application requirements shall apply to any manure derived from CFO's or CAFO's within Delaware County, Indiana, or to be applied to land within Delaware County, Indiana.

- a. Any manure that is to be applied to land within Delaware County, Indiana shall be covered and bermed within 72 hours of delivery.
- b. All manure management requirements of the Indiana Department of Environmental Management and the Office of the Indiana State Chemist shall be followed.

Satellite manure storage facilities, which are manure storage structures not located at a livestock or poultry production area, shall meet the same Land Use Separation Distance Requirements and Environmental Separation Requirements that apply to a CFO or CAFO as set forth herein.

**9. Manure Storage Facility Closure:**

The owner/operator of confined feeding or concentrated animal feeding operations that plans to close or discontinue use of a manure storage facility must comply with the requirements set forth herein in addition to all applicable state requirements. The following items shall be filed

with the Plan Commission, the Delaware County Health Department, and the Delaware County Zoning Administrator:

- a. Written notice of the anticipated date to cease operation shall be forwarded not less than 60 days prior to closure. At this time, the Commission, the Health Department and/or the Zoning Administrator should forward any local concerns dealing with closure to IDEM.
- b. A copy of the certification submitted by the owner/operator to IDEM that states compliance with all state requirements for the closure or discontinued use of a manure storage structure, a copy of any additional closure requirements imposed on the owner/operator by the state, and a copy of the letter of confirmation from the Indiana Department of Environmental Management verifying that the state requirements for closure have been met.

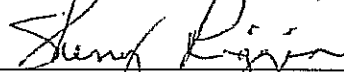
Within 180 days of the notice to discontinue use of the manure storage structure, the owner/operator shall start the process of manure removal and within 365 days of the notice, shall complete the process and meet the IDEM requirement of no remaining potential to discharge. If, at the end of the 365 days, the terms of Item 2 above have not been met, the Delaware County Commissioners may utilize the bond/surety to accomplish proper closure of the manure storage structure. Additional costs in excess of the bond/surety, incurred by the Delaware County Commissioners, shall be assessed as a lien against the property.


**SECTION 6.** That Article XXXIII, DEFINITIONS, Section 1 General shall be amended by inserting a new sentence at the end of as follows: Where definitions are based on state or federal definitions and citations may change, the term(s) continues to be defined as set forth in applicable state or federal regulations.

**SECTION 7.** That this Ordinance shall be in full force and effect from and after its passage by the Board of Commissioners of Delaware County, Indiana and such publication as required by law.


**SECTION 8.** That this Ordinance is hereby adopted this 22 day of January, 2018.

BOARD OF COMMISSIONERS  
DELAWARE COUNTY, INDIANA

  
\_\_\_\_\_  
Sherry Riggins, President

  
\_\_\_\_\_  
Shannon Henry

  
\_\_\_\_\_  
James King

ATTEST:   
\_\_\_\_\_  
Steven G. Craycraft, Delaware County Auditor

**REPORT TO THE BOARD OF COUNTY COMMISSIONERS  
OF DELAWARE COUNTY, INDIANA**

January 8th, 2019

**To the Honorable:**

Board of County Commissioners of Delaware County, Indiana

**Dear Commissioners:**

**ORIGINAL**

The Delaware-Muncie Metropolitan Plan Commission hereby submits to you the following report on AN ORDINANCE TO AMEND THE TEXT OF THE DELAWARE COUNTY COMPREHENSIVE ZONING ORDINANCE REGARDING CONFINED FEEDING OPERATIONS AND CONCENTRATED ANIMAL FEEDING OPERATIONS.

**WHEREAS,** the Delaware-Muncie Metropolitan Plan Commission is charged, by state statute, with the preparation of amendments to the zoning ordinance in order to maintain a viable updated ordinance dealing with planning and zoning and said Commission has reviewed, revised and adapted certain standards for Delaware County, Indiana; and

**WHEREAS,** the said Plan Commission initiated a public hearing and, following discussion and the public hearing, a motion was made, seconded and approved to forward a favorable recommendation for the proposed amendment as attached with revisions; and

**WHEREAS,** the said Plan Commission has given reasonable regard to the comprehensive plan, current conditions and the character of current structures and uses in each district, the most desirable use for which the land in each district is adapted, the conservation of property values throughout in the jurisdiction and responsible growth and development.

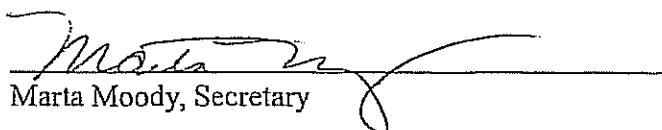
**NOW, THEREFORE,** the Delaware-Muncie Metropolitan Plan Commission hereby **FAVORABLY RECOMMENDS** (8-0; 0 abstained, 1 absent) the proposed amendment to the Delaware County Comprehensive Zoning Ordinance regarding confined feeding operations and concentrated animal feeding operations as more accurately set forth in the attached Ordinance to Amend.

**DELAWARE-MUNCIE METROPOLITAN  
PLAN COMMISSION**

**BY:**



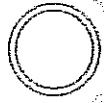
Shannon Henry, President



Marta Moody, Secretary



# CFO-CAFO SUMMARY REPORT



FINAL RECOMMENDATIONS  
FOR  
AMENDMENTS TO THE DELAWARE COUNTY  
COMPREHENSIVE ZONING ORDINANCE  
REGARDING CFO'S & CAFO'S

# SUMMARY REPORT

COMMITTEE MEMBERS IN SUPPORT OF THE  
RECOMMENDATIONS (SOME RELUCTANTLY/WITH  
RESERVATIONS): MARK CARTER, ELIZABETH DRISCOLL,  
JENNIFER IRVING, MARTA MOODY, JEFF TURNER  
COMMITTEE MEMBERS NOT IN SUPPORT OF THE  
RECOMMENDATIONS:

JOE RUSSELL, EUGENE WHITEHEAD

## SUMMARY REPORT

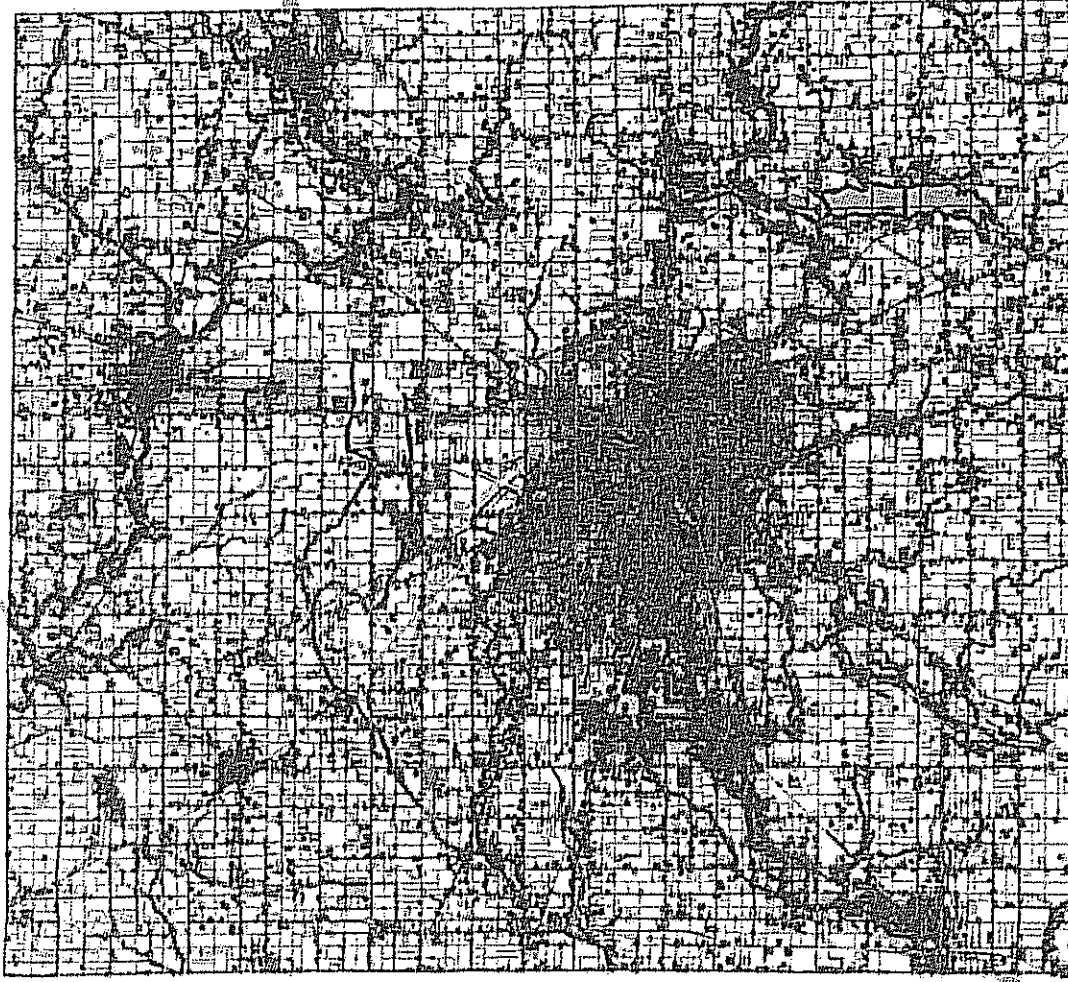
Graphic representation  
of HDEM requirements:

1000' from public water  
supply well/intake

300' from surface water,  
inlets, sinkholes, off-site  
wells (100' for solid  
manure facilities)

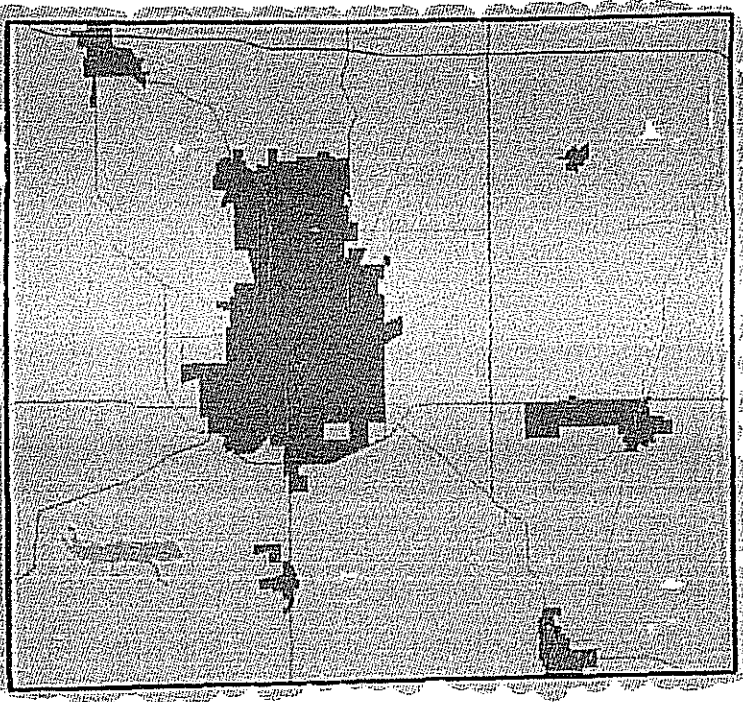
100' from on-site wells,  
property lines, roads

400' from a residence,  
public buildings

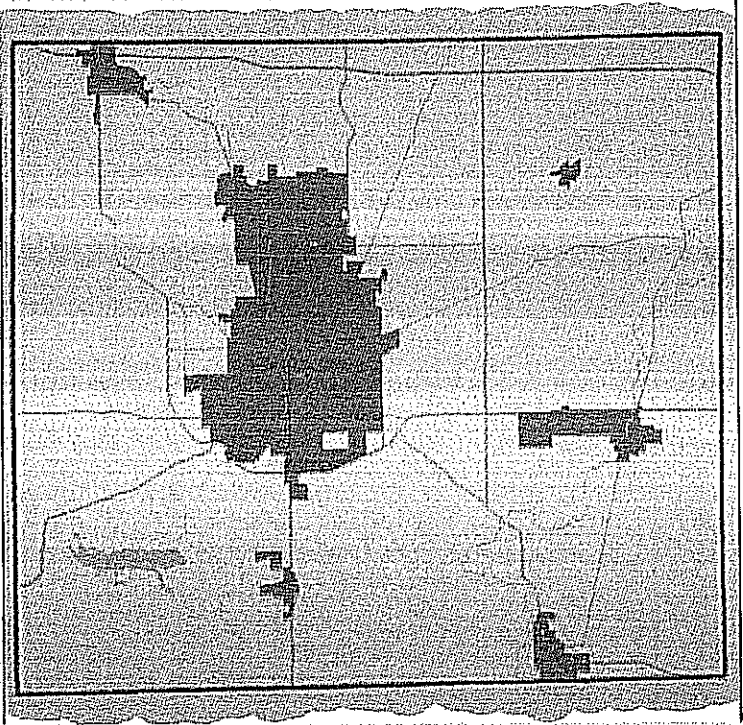


# SUMMARY REPORT

1/2 mile buffers from  
address points

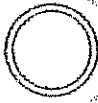


1 mile buffers from  
address points



Requests were made for 1/2 mi. & 1 mi. setbacks from residences – the graphics show 1/2 mi. eliminates almost all sites and 1 mi. does eliminate all areas of the county from being able to have a CAFO operation.

# SUMMARY REPORT



## DENSITY/AND PERINING RURAL DELAWARE COUNTY/POPULATION DENSITY

	Land Area (sq.mi.)*	2010 Population**	2017 Pop Estimate**	2010 Density/sq.mi.	2017 Density/sq.mi.
Delaware County	392.12	117,671	115,184	300.1	293.7
Muncie	27.57	70,085	68,625	2,542.1	2,489.1
Yorktown	8.83	9,405	11,199	1,065.1	1,286.3
Albany	1.84 (1.93 in 2017)	2,165	2,169	1,176.6	1,123.8
Eaton	3.77	1,805	1,741	478.8	461.8
Daleville	2.05	1,647	1,665	803.4	812.2
Gaston	0.36	871	859	2,419.4	2,386.1
Selma	0.90	866	835	962.2	927.8
Chesterfield	0.06	2	2	33.3	33.3
Unincorporated Rural Areas	346.74 (2010) 346.65 (2017)	30,825	28,089	88.9	81.0

\*Land area calculations for the incorporated areas from GIS corporate limit data layer's attribute table.

\*\*Population data from the U.S. Census Bureau: American Fact Finder.

# SUMMARY REPORT



## • DENSITY AND DEFINING RURAL

- The average household size of Indiana in 2010 was 2.52 and 2.55 in 2017 (U.S. Census Bureau Quick Facts-2017 with data through 2016).
- Using the more conservative 2017 density above of 81/sq. mi. and dividing by the average household size in Indiana = 31.76 or (rounding up) 32 houses. The average household size of the most rural counties in Indiana is 2.48 which would equate to 32.66 or 33 houses. The average household size of the counties with similar density is 2.47 which equates to 32.79 or 33 houses. Using the most conservative number, it would be 32 houses per square mile which is in a similar range as some of the other counties considered most rural. Then, taking half of that as indicating an even more rural character, 16 houses or fewer per sq. mi. (or 40-41 people/sq. mi.) would be those areas most similar to the most rural Indiana counties.
- STATS Indiana data.

# SUMMARY REPORT

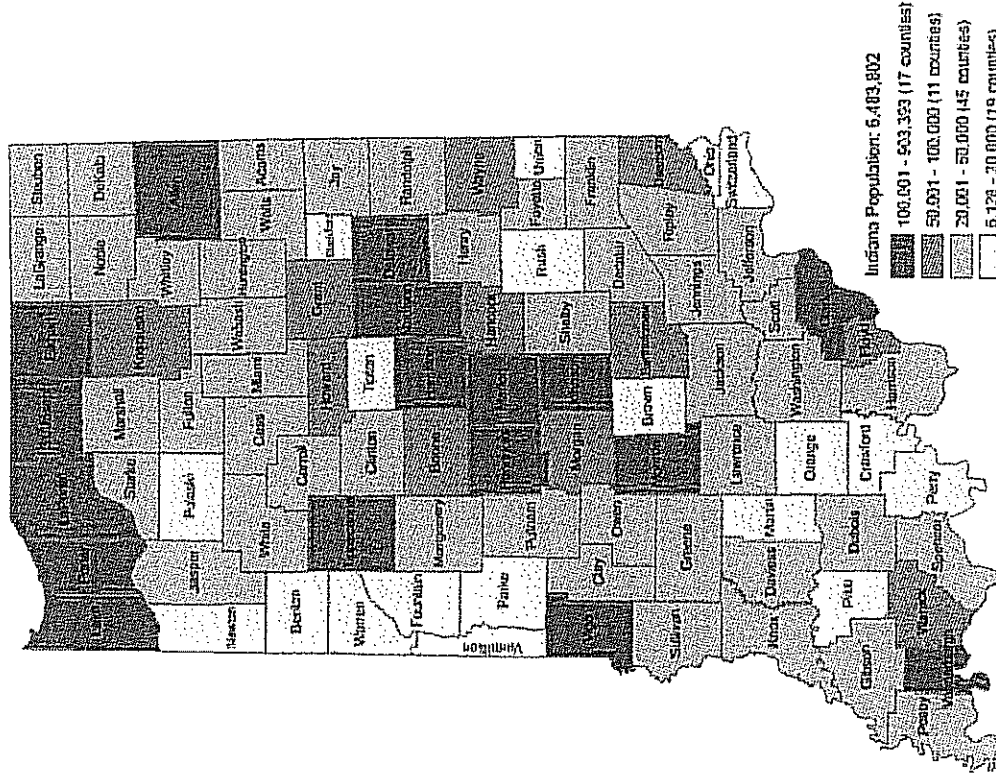
Countries with density similar to Delaware:

- Clark
- Etendricks
- Howard
- Madison
- Monroe
- Tippecanoe
- Vigo

Countries with lowest density:

- Fountain
- Rush
- Parke
- Pike
- Newton
- Crawford
- Pulaski
- Martin
- Warren
- Benton

Population by County, 2010



Source: U.S. Census Bureau, U.S. Census Bureau, using data from the U.S. Census Bureau, PL94-171, February 2011

# SUMMARY REPORT

## Definition for Del. Co. Rural agricultural areas

- **Rural Agricultural Area:** Any area classified in the F Farming Zone where there are thirty-two (32) or fewer dwelling units in a circular area equal to a square mile as measured from the center point of the production area with a radius of 2,979 feet. Rural agriculture areas shall consist of two levels as follows: Level 1 shall be those areas with 16 or fewer dwelling units within the square mile area described herein; and Level 2 shall be those areas with 17 to 32 dwelling units within the square mile area described herein.

## Definition for Del. Co. Rural residential areas

- **Rural Residential Area:** Any area classified in the F Farming Zone where there are 33 or more dwelling units in a circular area equal to a square mile as measured from the center point of the production area with a radius of 2,979 feet.



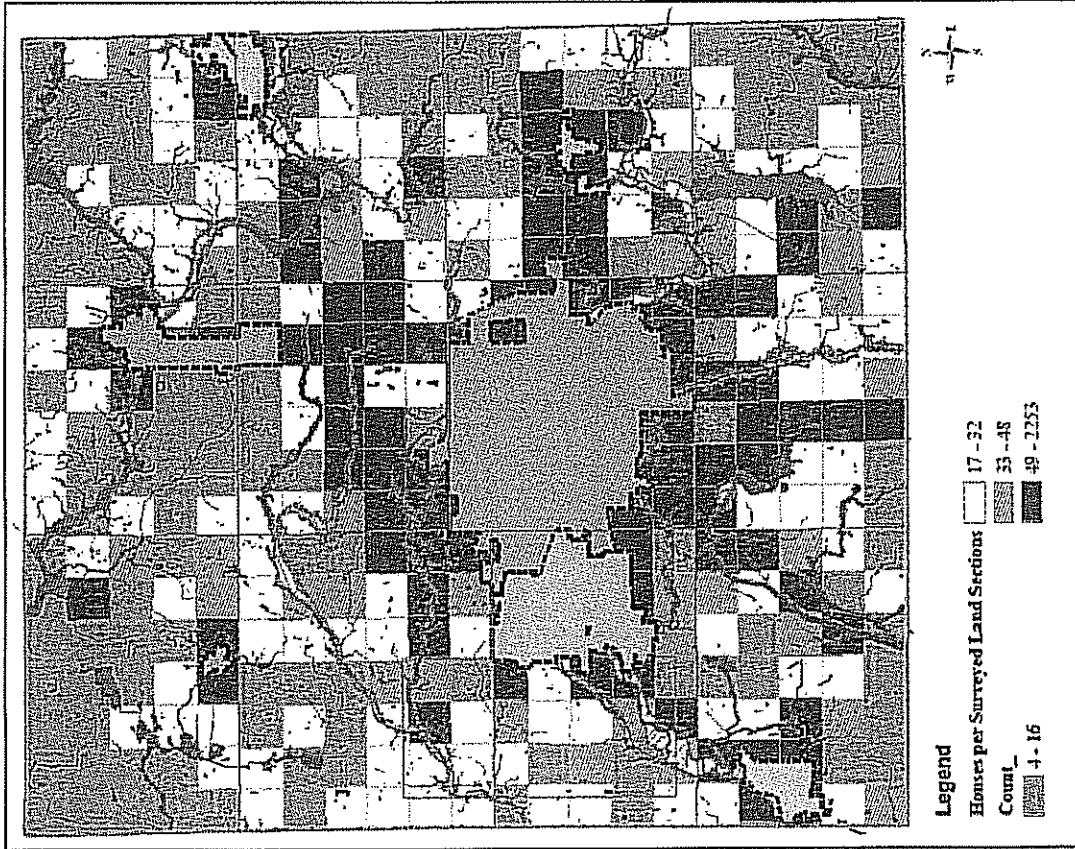
# SUMMARY REPORT

The green areas were labeled Rural Agricultural Level 1

The beige areas were labeled Rural Agricultural Level 2

The pink and black areas were labeled Rural Residential

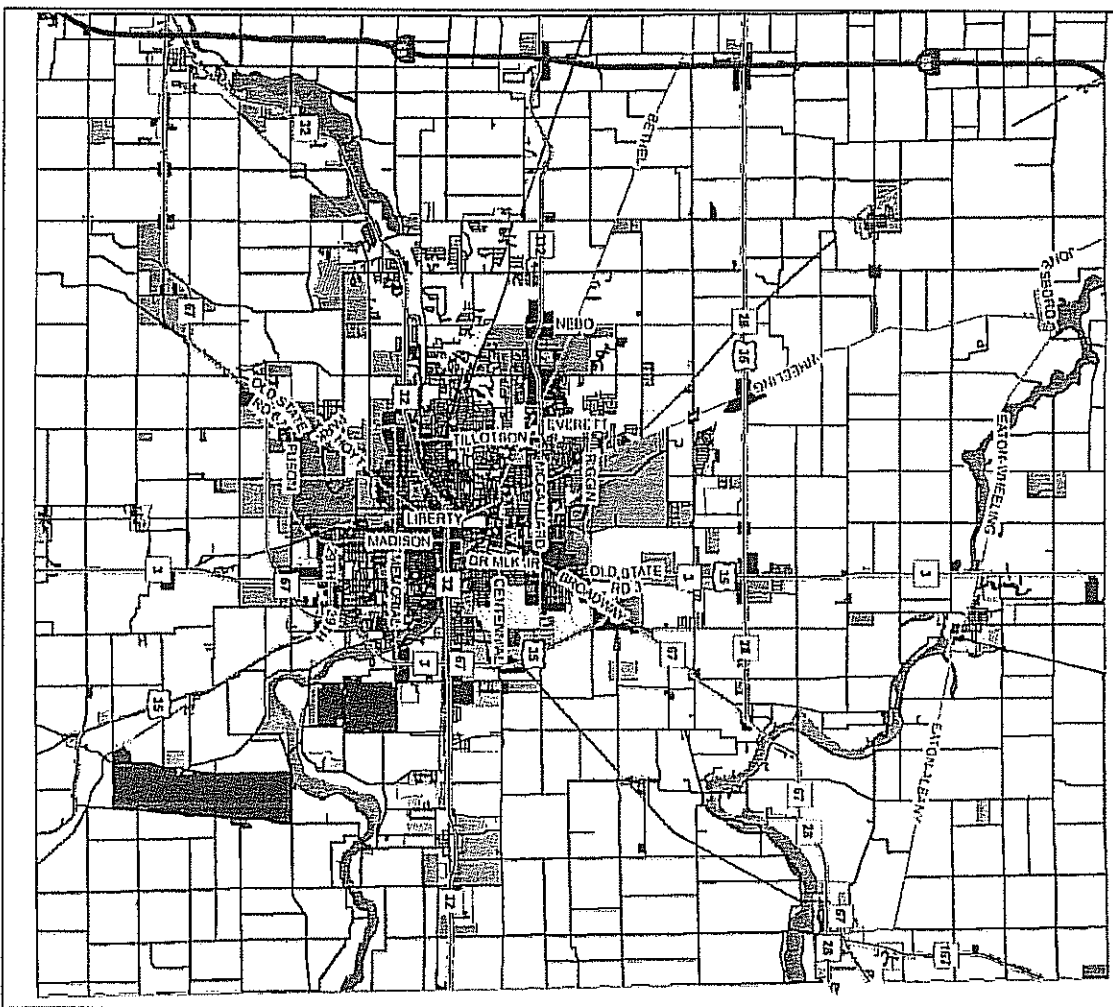
The graphic is representational only - each proposed site would have to be evaluated to determine zoning & the # of residences in a circular mile area



# SUMMARY REPORT

**ZONE**

[Pattern]	AGRICULTURAL BIOENTERPRISE
[Pattern]	CENTRAL BUSINESS ZONE
[Pattern]	AIRPORT DEVELOPMENT ZONE
[Pattern]	BUSINESS PROFESSIONAL
[Pattern]	COMMUNITY BUSINESS ZONE
[Pattern]	FARMING ZONE
[Pattern]	FLOOD AREA ZONE
[Pattern]	INDUSTRIAL PARK ZONE
[Pattern]	INTENSE INDUSTRIAL ZONE
[Pattern]	LIMITED BUSINESS ZONE
[Pattern]	LIMITED INDUSTRIAL ZONE
[Pattern]	MAJOR TRADING ZONE
[Pattern]	MOBILE HOME RESIDENCE ZONE
[Pattern]	RECREATION AND CONSERVATION ZONE
[Pattern]	RESIDENCE ZONE 1
[Pattern]	RESIDENCE ZONE 2
[Pattern]	RESIDENCE ZONE 3
[Pattern]	RESIDENCE ZONE 4
[Pattern]	Residence zone 4a
[Pattern]	RESIDENCE ZONE 5
[Pattern]	RESIDENCE ZONE 6
[Pattern]	STUDENT SOCIAL SERVICE ZONE
[Pattern]	VARIETY BUSINESS ZONE



# SUMMARY REPORT



COUNTY	RESIDENCE SETBACK	MUNI SETBACK	CHURCH SETBACK	SCHOOL SETBACK	REG AREA SETBACK	OTHER SETBACKS	LOT SIZE MINIMUM	ROW SETBACK	PROP LINE SETBACK	USAGE PROVISION
<b>COUNTIES OF SIMILAR OVERALL DENSITY TO DELAWARE COUNTY</b>										
CLARK	-	-	-	-	-	-	-	-	-	SE
HENDRICKS	-	-	-	-	-	-	10A	35-80'	30' S/50' R	PU
HOWARD	-	-	-	-	-	-	-	-	-	PU
MADISON	500'	-	-	-	-	1320' RESZ	40A	-	100'	SE
MONROE	-	-	-	-	-	-	-	-	1320' not ag	CU
TIPPECANOE	1000'	-	1000'	1000'	-	1000' RESZ	-	VARIES	200'	PU
VIGO	-	-	-	-	-	-	-	-	-	PU-A, SE-OS
<b>COUNTIES WITH POPULATION DENSITIES FROM 43.6 PEOPLE/SQ. MI. TO 211.8/SQ. MI. (LOWEST INDIANA DENSITY)</b>										
FOUNTAIN	NO ZONING	-	-	-	-	-	-	-	-	PERMITTED
RUSH	750'	-	-	5280'	-	-	40A	750'	200'	SE
PARKE	NO ZONING	-	-	-	-	-	-	-	-	PERMITTED
PIKE	NO ZONING	-	-	-	-	-	-	-	-	SE
NEWTON	500'	-	1320'	1320'	1320'	1320' RES Z	-	35'/100'	-	PERMITTED
CRAWFORD	NO ZONING	-	-	-	-	-	-	-	-	PU/REZONE
PULASKI	1320'	5280'	-	-	-	1320' RESZ	40A	-	-	PERMITTED
MARTIN	NO ZONING	-	-	-	-	-	-	-	-	SE/PU 1 MI
WARREN	-	-	-	-	-	1 MI RES Z	-	-	-	SE
BENTON	500'	-	-	-	500'	-	-	-	80' F	SE
IN Ord.s	900'	5280'	1320'	1320'	1320'	1320'	30A	100'	140'	
Medians										
IN Ord.s	941'*	3804'	1500'	2391'	1519'	1513' RES Z	25.8A	193'	216'	
Mean										
DELAWARE	Varies -	1/2 mile &	1,320'	5,280'	1,320'	Res Z -	40 A	200'	400'	Rural Ag PU
PROPOSED	see next page	1 mi. = see next pg.				1,320' & 2,640'				Rural Res SU

# SUMMARY REPORT



	Residence (not on CFAO/CAFO site; not operated/occupied by applicant)	Residence Zone	Platted Subdivision	Public/Private School (not home of temporary school)	Corporate Limits of any City or Town	Public Use Recreation Area	Hospital, Institution for Blind, Deaf, Child Care Centers	Church/Religious Institution
Level 1 Rural Agricultural Area	CFO - 500 CAFO - 1,000	1,320	1,320	5,280	< 5000 pop. - 2,640 >5000 pop. - 5,280	1,320	5,280	1,320
Level 2 Rural Agricultural Area	CFO - 660 CAFO - 1,320	1,320	1,320	5,280	<5000 pop. - -2,640 >5000 pop. - 5,280	1,320	5,280	1,320
Rural Residential Area	CFO - 750 CAFO - 1,500	2,640	2,640	5,280	5,280	1,320	5,280	1,320

ENVIRONMENTAL REGULATIONS/STANDARDS	LAGOON SYSTEM	NON-LAGOON SYSTEM
Public Water Supply Wells, Rivers (White/Mississinewa) and Prairie Creek Reservoir	2 miles	1 mile
Surface Waters of the State, Regulated Open Drains (ditches, waterways, wetlands)	5,280 ft.	300 ft.
100-Year Floodplain	5,280 ft.	300 ft.
Drainage Inlets & Off-site Water Wells	1,320 ft.	300 ft.
On-site Water Wells	400 ft.	100 ft.
Regulated Drain Tiles	400 ft.	100 ft.

## HOME RULE AND PREEMPTION ISSUES REGARDING COUNTY ORDINANCES THAT REGULATE CONFINED FEEDING OPERATIONS

By: Kim E. Ferraro, Senior Staff Attorney, Hoosier Environmental Council

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Confined Feeding Operations and Concentrated Animal Feeding Operations (collectively “CFOs”) in Indiana are regulated under state law. Some Indiana counties have responded to the lack of effective regulation of CFOs by the state by strengthening their own ordinances. Some county planners, however, are under the misconception that such ordinances—specifically with respect to land application of manure—are preempted by state agency regulations. This brief memo, provides legal analysis demonstrating that counties are free to regulate CFOs including land application of manure on areas associated with the CFO as long as those ordinances do not conflict with IDEM regulation of CFOs.

### Local Authority and Indiana’s Home Rule Statute

The Indiana legislature has explicitly granted local governments powers to regulate conduct within their jurisdictions. For example:

- A local government unit may exercise planning and zoning powers to improve the health, safety, comfort, convenience, and welfare of their citizens and to plan for the future development of their communities.<sup>1</sup>
- “When it adopts a zoning ordinance, [a local government unit] shall act for the purposes of: (1) securing adequate light, air, convenience of access, and safety from fire, flood, and other danger; (2) lessening or avoiding congestion in public ways; (3) promoting the public health, safety, comfort, morals, convenience, and general welfare; and (4) otherwise accomplishing the purposes of this chapter.”<sup>2</sup>
- A local government body “may do the following in the zoning ordinance: (1) Establish one or more districts . . . (2) In each district, regulate how real property is developed, maintained, and used. This regulation may include: (A) requirements for the area of front, rear, and side yards, courts, other open spaces, and total lot area; (B) requirements for site conditions, signs, and nonstructural improvements, such as parking lots, ponds, fills, landscaping, and utilities; (C) provisions for the treatment of uses, structures, or conditions that are in existence when the zoning ordinance takes effect; (D) restrictions on development in areas prone to flooding; (E) requirements to protect the historic and architectural heritage of the community; (F) requirements for structures, such as location, height, area, bulk, and floor space; (G) restrictions on the kind and intensity of uses; (H) performance standards for the emission of noises, gases, heat, vibration, or particulate matter into the air or ground or across lot lines; (I) standards for population density and traffic circulation; and (J) any other provisions that are necessary to implement the purposes of the zoning ordinance.”<sup>3</sup>
- A unit may “regulate conduct, or use or possession of property that might endanger the public health, safety, or welfare.”<sup>4</sup>

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<sup>1</sup> See IND. CODE §§ 36-7-4-100 to -1513 (Indiana planning and zoning law).

<sup>2</sup> IND. CODE § 36-7-4-601(c).

<sup>3</sup> IND. CODE § 36-7-4-601(d).

<sup>4</sup> IND. CODE § 36-8-2-4.

- A unit may “regulate the introduction of any substance or odor into the air, or any generation of sound.”<sup>5</sup>
- A unit may “regulate the introduction of any substance into a watercourse or onto its banks.”<sup>6</sup>
- A unit may “plan for and regulate the use, improvement, and maintenance of real property and the location, condition, and maintenance of structures and other improvements.”<sup>7</sup>
- A unit may “regulate excavation, mining, drilling, and other movement or removal of earth below ground level.”<sup>8</sup>

In addition to the above explicit statutory grants of power, Indiana’s Home Rule Act (“Act”) enacted in 1980, grants county governments “all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute.”<sup>9</sup> The Act abrogated the traditional rule that local governmental powers were limited to those expressly granted by state statute.<sup>10</sup> Thus, the omission of a power from the Indiana statutes does not imply that counties lack that power.<sup>11</sup> The Act further directs that “[a]ny doubt as to the existence of a power of a [local government unit] shall be resolved in favor of its existence.”<sup>12</sup> These broad grants of power to local governments were intended to further Indiana’s policy of “granting [counties, municipalities, and townships] all the powers that they need for the effective operation of government as to local affairs.”<sup>13</sup>

Counties’ broad Home Rule authority to regulate the use of land, does have certain limits. Specifically, the Home Rule Act at Ind. Code § 36-1-3-8(a)(7) provides that a local government unit does not have “the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.” This provision has been interpreted by Indiana Courts to mean that a state statute (and its associated agency regulations) can preempt local regulations either by: (1) express language; or (2) by implication. Such “implied preemption” is further categorized as either field preemption or conflict preemption. Field preemption occurs where the scheme of state regulation is sufficiently pervasive and comprehensive to make a reasonable inference that the state legislature left no room for supplementary local regulation. Conflict preemption on the other hand occurs where compliance with both state and local regulation would be impossible, or where local regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the state legislature. *See e.g., Lex, Inc. v. Board of Trustees of Town of Paragon*, 808 N.E.2d 104 (Ind. Ct. App. 2004); *Yater v. Hancock County Planning Commission*, 614 N.E.2d 568 (Ind. Ct. App. 1993); *Kentuckiana Medical Center LLC v. Clark County, Ind.*, 2006 U.S. Dist. LEXIS 3298 (S.D. Ind. January 18, 2006); and *Sisters of St. Francis Health Services, Inc. v. Morgan County, Ind.*, 397 F. Supp. 2d 1032 (S.D. Ind. 2005). Put another way, a local CFO ordinance is not preempted by state law, even if it regulates in the same subject areas as the state, so long as the local standards do not completely overlap or conflict with the state law, or fall within an express preemption provision in the state law.

<sup>5</sup> IND. CODE § 36-8-2-8

<sup>6</sup> IND. CODE § 36-9-2-12.

<sup>7</sup> IND. CODE § 36-7-2-2.

<sup>8</sup> IND. CODE § 36-7-2-6.

<sup>9</sup> IND. CODE §§ 36-1-3-4(b)(1) and (2).

<sup>10</sup> IND. CODE § 36-1-3-4(A).

<sup>11</sup> IND. CODE § 36-1-3-4(C).

<sup>12</sup> IND. CODE § 36-1-3-3(B).

<sup>13</sup> IND. CODE § 36-1-3-2.

In that regard, there are two state laws that could conceivably preempt local regulation of CFOs: (1) the Office of the State Chemist's (OISC's) regulation of "Fertilizer Material" and (2) the Indiana Department of Environmental Management's (IDEM's) regulation of CFOs. As discussed below, neither preempt local regulation of CFOs including land application of manure on sites associated with CFOs. The OISC Rule, however, may preempt local regulation of land application of manure to off-site crop land not associated with a CFO due to an express provision in the OISC law that could be construed to preclude such local regulation.

### IDEM's CFO Rule Does Not Preempt Local CFO Ordinances

As an initial matter, there is no express preemption provision in Indiana's CFO law at Ind. Code § 13-18-10, *et. seq.* or the associated IDEM regulations at 327 IAC 19. Thus, express preemption is not an issue with respect to IDEM regulation of CFOs.

Turning to the possibility of implied preemption, it is important to note that in enacting Ind. Code § 13-18-10, the legislature granted limited authority to IDEM to regulate the construction, expansion, and operation of confined feeding operations" including "construction, expansion, and manure containment that are appropriate for a specific site and manure application and handling that are consistent with best management practices designed to reduce the potential for manure to be conveyed off a site by runoff or soil erosion, and that are appropriate for a specific site." Ind. Code § 13-18-10-4 (emphasis added). In turn, the purpose of the IDEM regulations is to: "(1) impose construction and operational requirements for CFOs in order to implement IC 13-18-10; and (2) protect human health and the environment from threats to water quality." 327 IAC 19-1-1 (emphasis added). The regulations apply to "all CFOs as defined in IC 13-11-2-40," and prohibit "construction of a CFO or expansion of a CFO that increases animal capacity or manure containment capacity, or both without obtaining the prior approval" from IDEM. 327 IAC 19-1-2. And with particular relevance to land application of manure, the IDEM Rule applies only to "[I]and application of manure, litter, or process wastewater to land that is: (1) owned by the permittee; (2) rented by the permittee; or (3) utilized by the permittee under an agreement for land use . . . done in accordance with the requirements of the [IDEM Rule]." 327 IAC 19-14-1.<sup>14</sup>

In other words, the focus of IDEM's limited authority is to ensure that water quality is protected by imposing site-specific requirements for construction, expansion and operation of CFOs including their associated and site specific manure containment and land application activities. The IDEM Rule is not aimed at regulating land application of manure on sites not

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<sup>14</sup> And notably, "manure" is defined in the IDEM rule to mean:

"(1) Liquid or solid animal excreta. (2) Waste liquid generated at a livestock or poultry production area, including the following: (A) Excess drinking water. (B) Cleanup water. (C) Contaminated livestock truck or trailer washwater. (D) Milking parlor wastewater. (E) Milk house washwater. (F) Egg washwater. (G) Silage leachate. (3) Any precipitation or surface water that has come into contact with the following: (A) Liquid or solid animal excreta. (B) Used bedding. (C) Litter. (D) Liquid described in subdivision (4). (4) Any other materials generated at a livestock or poultry production area commingled with the materials listed in subdivisions (1) through (3)."

associated with a CFO. Furthermore, the IDEM Rule is not focused in any way on assuring appropriate siting of CFOs, protecting air quality, or property values from CFOs, or preventing nuisances from CFOs. Indeed, IDEM plainly states on its website that it does not regulate CFOs for protection of “property values, public road conditions and traffic, where CFOs and CAFOs can locate, disposal of dead animals, groundwater use, odors and vectors.” <http://www.in.gov/idem/cfo/2342.htm>.

Thus, any local ordinances – even if they address aspects of construction, expansion, operation, or land application activities at CFOs – would not be in conflict or overlap with IDEM regulations (and, therefore, not preempted) as long as the ordinances are aimed at protecting air quality, property values, preventing nuisances or otherwise enacted to serve public health, safety and welfare. Furthermore, because the setbacks and performance standards in the IDEM CFO Rule are aimed at preventing excess nutrients (phosphorus and nitrogen) in manure from reaching waterways, as opposed to the known pathogens contained in manure including *E.Coli*, See 327 IAC 19-2-2; 327 IAC 19-7-5; 327 IAC 19-14-3; 327 IAC 19-14-6, any local ordinances can impose specific requirements to address that wholly unregulated issue for protection of water quality as well.

#### **State Chemists’ “Fertilizer” Rule May Preempt Local Regulation of Land Application Activities Not Associated With a CFO**

While the IDEM CFO rule focuses on regulating “manure” generated from a CFO including land application of manure on acreage associated with a CFO, the OISC is directed to “adopt rules” for the “distribution of *manure based fertilizer*,” defined as “processed manure based *commercial fertilizer* with a manure content of at least seventy-five percent (75%).” Ind. Code § 15-16-2-1.5. (emphasis added). The term “commercial fertilizer” in turn means “mixed fertilizer or fertilizer materials [and] . . . does not include *nonprocessed manure*, marl, lime, wood ashes, or plaster.” Ind. Code § 15-16-2-8. The term “distribution” is not specifically defined by the statute but a “distributor” is defined as “a person who offers for sale, sells, barter, or supplies commercial fertilizers.” Ind. Code § 15-16-2-10. In other words, as it pertains to CFOs, the State Chemist regulation comes into play only if manure generated from a CFO is processed in some way to meet the definition of “manure based fertilizer” and is then distributed to a third party for use as a fertilizer (as opposed to untreated, unprocessed manure that is applied to land owned or in control of the CFO owner).

But that’s not all. The State Chemist is also directed to “adopt rules” for establishing “certification and educational programs . . . relating to the application of *fertilizer material*, the transportation of *fertilizer material*, or both for . . . persons who apply *fertilizer material* for hire, transport *fertilizer material* for hire, or both from . . . confined feeding operations . . . [or] . . . operations outside Indiana that would be confined feeding operations . . . if they were located in Indiana.” Ind. Code § 15-16-2-44 (emphasis added). “Fertilizer material” is defined by the statute to mean “any substance containing nitrogen, phosphate, potash, or any recognized plant nutrient that is used for the plant nutrient content, has nutrient value in promoting plant growth [and] includes *unmanipulated* animal and vegetable manures.” Ind. Code § 15-16-2-11 (emphasis added). Arguably this definition would include untreated “manure” from CFOs. Nevertheless, the



focus of the OISC regulation remains on land application of CFO manure—to the extent it meets the definition of “fertilizer material”—on cropland not associated with a CFO.

And notably, the stated purpose of this aspect of the OISC Rule is to “(1) ensure fertilizer materials are distributed and used effectively and safely: (A) as *plant nutrients*; and (B) in a manner that protects water quality; and (2) *complement authorities* granted to the Indiana Department of Environmental Management.” 355 IAC 8-1-1 (emphasis added). Put another way, the State Chemist has authority to regulate the distribution and use of CAFO waste to the extent that it meets the definition of “manure based fertilizer” or “fertilizer material” on land not associated with a CFO for protection of water quality from excess nutrients. The OISC is not in any way involved in regulating fertilizer distribution and use for the protection of air quality, property values, pathogen contamination or public health, safety and welfare.

With this in mind, the OISC implementing statute does contain an express preemption provision that prohibits local governments from “regulat[ing] by ordinance the storage or use of *fertilizer material*” without first “petition[ing] the state chemist for a hearing to allow a waiver to adopt an ordinance because of special circumstances relating to the storage or use of *fertilizer material*.” Ind. Code § 15-16-2-50. Aside from the potentially conflicting definitions of what is actually being regulated by the State Chemist as it pertains to manure generated from CFOs—i.e., “manure based fertilizer” or “fertilizer material” -- determining what specific activities that local governments are prohibited from regulating under this provision is less than clear.

Specifically, the provision prohibits local governments from regulating the “storage or use of fertilizer material.” “Storage” is defined to mean “the storage of *bulk fertilizer* by a person who manufactures or distributes *bulk fertilizer*; or stores *bulk fertilizer* for personal use.” Ind. Code § 15-16-2-21 (emphasis added). “Bulk fertilizer” in turn is defined as “*a commercial fertilizer distributed in nonpackaged form*.” Ind. Code § 15-16-2-7 (emphasis added). And again, “commercial fertilizer” is expressly defined to not include nonprocessed manure. Ind. Code § 15-16-2-8. On the other hand, “use” is defined to mean “the application of *fertilizer material* on an agricultural crop growing area, handling of fertilizer materials; or transportation of fertilizer materials.” 355 IAC 7-2-19. As stated above, the definition of “fertilizer material” does include unmanipulated animal manure.” Ind. Code § 15-16-2-11. Based on these conflicting and confusing provisions, there is minimal legal basis to conclude that the preemption provision of the OISC Rule even prohibits local governments from regulating land application of manure on crop land not associated with a CFO. More importantly, there is absolutely no legal basis for the proposition that the OISC Rule prohibits local governments from going beyond what IDEM requires for land application of manure generated by a CFO on land associated with the CFO.