

Decision Summary LA19053

This document summarizes my reasons for issuing Approval LA19053 under the *Agricultural Operation Practices Act* (AOPA). Additional reasons are in Technical Document LA19053. All decision documents and the full application are available on the Natural Resources Conservation Board (NRCB) website at www.nrcb.ca under Confined Feeding Operations (CFO)/CFO Search. My decision is based on the act and its regulations, the policies of the NRCB, the information contained in the application, and all other materials in the application file.

1. Background

On December 16, 2019, Chad Lundberg (Lundberg) submitted a Part 1 application to the NRCB to construct a new 3,000 beef finisher, 3000 beef feeder CFO with the construction of pens – 257 m x 310 m and a catch basin – 45 m x 70 m x 3 m. The Part 2 application was submitted on May 4, 2020 at which case Lundberg had reduced the size of the application to be for 3,000 beef finishers. On May 13, 2020, I deemed the application complete.

Under AOPA, this type of application requires an approval. (This is one of several types of “permits” issued under AOPA. For an explanation of the different types and when each one applies, see www.nrcb.ca.)

a. Location

The proposed CFO is located at SW 7-17-27 W4M in Foothills County, roughly 8 km northeast of the town of Nanton. The terrain is generally flat with surface water draining towards small sloughs which occur sporadically in the area.

2. Notices to affected parties

Under section 19 of AOPA, the NRCB is required to notify (or direct the applicant to notify) all parties that are “affected” by an approval application. Section 5 of AOPA’s Part 2 Matters Regulation defines “affected parties” as:

- the municipality where the CFO is or is to be located
- any other municipality whose boundary is within a specified distance from the CFO, depending on the size of the CFO
- all individuals who own or reside on land within a specified distance from the CFO, depending on the size of the CFO

For this application, the distance is 1.5 miles. (The NRCB refers to this distance as the “affected party radius.”)

Municipalities that are affected parties are defined by the act to be “directly affected” and are entitled to provide evidence and written submissions. Foothills County is an affected party (and therefore also a directly affected party) because the proposed facility is located within its boundaries. Municipal District of Willow Creek is also an affected party (and therefore also a directly affected party) because its boundary is within the 1.5 mile affected party radius.

All other parties who receive notice of the application may request to be considered “directly affected.” Under NRCB policy, all individuals who own or reside on land within the affected party radius are presumed to be “directly affected” if they submit a written response to the notice within the prescribed timeline. See NRCB Operational Policy 2016-7: *Approvals*, part 6.2.

Under section 20 of the act, all directly affected parties are entitled to a reasonable opportunity to provide evidence and written submissions regarding the application.

All directly affected parties are also entitled to request an NRCB board review of the approval officer’s decision on the approval application.

The NRCB published notice of the application in the Nanton News on March 13, 2020 and posted the full application on the NRCB website for public viewing. The NRCB also emailed referral letters and a copy of the complete application to Foothills County, the Municipal District of Willow Creek, Alberta Health Services (AHS), Alberta Environment and Parks (EP), and Alberta Transportation. Twenty-five courtesy letters were sent to people identified by Foothills County and the Municipal District of Willow Creek as owning or residing on land within the affected party radius.

3. Responses from the municipalities and referral agencies

I received responses from Foothills County and Alberta Transportation. No response was received from the Municipal District of Willow Creek, AHS, or EP.

Ms. Heather Hemingway, the Director of Planning, provided a written response on behalf of Foothills County. As noted in section 2, Foothills County is a directly affected party.

Ms. Hemingway stated that the application is consistent with Foothills County’s municipal development plan aside from the site being located within 0.5 miles of a dwelling. Ms. Hemingway also indicated the site is also subject to the Intermunicipal Development Plan which exists between the two municipalities. The application’s consistency with Foothills County’s municipal development plan, as well as the Intermunicipal Development Plan which exists between the Foothills County and the MD of Willow Creek, is addressed in Appendix A, attached.

Ms. Hemingway also listed the setbacks required by Foothills County’s land use bylaw (LUB) and noted that the application appears to these setbacks aside from being located within 0.5 miles of an existing dwelling.

Mr. Gerry Benoit, a development and planning technologist, provided a written response on behalf of Alberta Transportation. Mr. Benoit stated a permit would not be required from his department.

4. Responses from other directly affected parties

The NRCB received five responses from eight individuals.

Of the eight people who submitted responses, four own or reside on land within the 1.5 mile radius for affected persons. Because of their location within this radius, they are presumed to be directly affected by the application.

Four of the respondents do not own or reside on land within the 1.5 mile radius for affected persons. Appendix B sets out my reasons for determining which parties are directly affected by the application.

The directly affected parties raised concerns regarding:

- Increase dust and impact air quality
- Create odor, noise, insects and general nuisance impacts
- Reduce property values and what opportunity there is for compensation from applicant
- Reduce groundwater quality and volume, and what opportunity there is for financial compensation if an effect was to occur

These concerns are addressed in Appendix C. Mr. Lundberg also provided a written responses to these concerns which is also included in Appendix C.

5. Environmental risk screening of proposed facilities

As part of my review of this application, I assessed the risk to surface water and groundwater posed by the CFO's proposed manure storage facilities. I used the NRCB's environmental risk screening tool for this purpose (see NRCB Operational Policy 2016-7: *Approvals*, part 8.13). The tool provides for a numeric scoring of risks, which can fall within either a low, moderate, or high risk range. (A complete description of this tool is available under CFO/Groundwater and Surface Water Protection on the NRCB website at www.nrcb.ca.)

All of the CFO's proposed facilities pose a low potential risk to groundwater and surface water.

6. Other factors considered

The application meets all relevant AOPA requirements, with the terms and conditions summarized in part 7.

In addition, the proposed CFO is consistent with the land use provisions of Foothills County's municipal development plan as well as the intermunicipal development plan which exists along with the MD of Willow Creek. (See Appendix A for a more detailed discussion of the county's planning requirements.)

With respect to the act's technical requirements, the proposed CFO:

- Meets the required AOPA setbacks from all nearby residences (AOPA setbacks are known as the "minimum distance separation" requirements, or MDS)
- Meets the required AOPA setbacks from water wells, springs and common bodies of water
- Has sufficient means to control surface runoff of manure
- Meets AOPA's nutrient management requirements regarding the land application of manure
- Meets AOPA groundwater protection requirements for the design of floors and liners of manure collection areas

As required by section 4(1) of the South Saskatchewan Regional Plan (SSRP), I considered that document's Strategic Plan and Implementation Plan and determined that the application is consistent with those plans. In addition, there are no notices or orders under the Regulatory Details portion of the SSRP that apply to this application.

In addition, I assessed the effects of the proposed CFO on the environment. Consistent with NRCB policy, I presumed that these effects are acceptable because the application meets all of AOPA's technical requirements. I also presumed that the application's effects on the economy and community are acceptable, and that the proposed CFO is an appropriate use of land. Under NRCB policy, these presumptions are based on the application's consistency with the municipal development plan (See NRCB Operational Policy 2016-7: *Approvals*, part 8.7.3.). Having considered the information in the application, and from my site visit, and the responses from directly affected parties and referral agencies, there is not enough information to rebut these presumptions

7. Terms and conditions

Approval LA19053 specifies the permitted livestock capacity as 3,000 beef finishers and permits the construction of the pens and the catch basin.

Approval LA19053 also contains terms that the NRCB generally includes in all AOPA approvals, including terms stating that the applicant must follow AOPA requirements and must adhere to the project descriptions in their application and accompanying materials.

In addition to the terms described above, Approval LA19053 includes conditions that:

- Set a deadline of November 30, 2022 for the approved construction to be completed
- Prohibit the permit holder from placing manure or livestock in the feedlot pens or from allowing manure impacted runoff to enter the catch basin until the facilities have been inspected by the NRCB following their construction

For an explanation of the reasons for these conditions, see Appendix D.

8. Conclusion

Approval LA19053 is issued for the reasons provided above, in the attached appendices, and in Technical Document LA19053.

July 6, 2020

(Original signed)
Joe Sonnenberg
Approval Officer

Appendices:

- A. Consistency with the municipal development plan
- B. Determining directly affected party status
- C. Concerns raised by referral agencies and directly affected parties
- D. Explanation of conditions in Approval LA19053

APPENDIX A: Consistency with the municipal development plan

Under section 20 of AOPA, an approval officer may grant an application for an approval only if the approval officer finds that the application is consistent with the “land use provisions” of the applicable municipal development plan (MDP).

The NRCB interprets the term “land use provisions” as covering MDP policies that provide generic directions about the acceptability of various land uses in specific areas and that do not call for discretionary judgments relating to the acceptability of a given confined feeding operation (CFO) development. (See NRCB Operational Policy 2016-7: *Approvals*, part 6.4) Under this interpretation, the term “land use provisions” also excludes MDP policies that impose procedural requirements. In addition, section 20(2.1) of the act precludes approval officers from considering MDP provisions “respecting tests or conditions related to the construction of or the site” of a CFO or manure storage facility, or regarding the land application of manure. (These types of MDP provisions are commonly referred to as MDP “tests or conditions.”)

The Lundberg’s CFO will be located in Foothills County and is therefore subject to that municipality’s MDP. The municipality adopted this plan on July 8, 2010 under Bylaw #78/2010, and last amended in on October 11, 2017.

Policies 8 to 11, and 13 relate to CFOs. (Policy 12 relates to proposed developments near existing CFOs.) None of the CFO references in these five policies are specifically to “new” CFOs or to “expansions” of existing CFOs. However, it seems reasonable to interpret these policies as having been intended to apply to new CFOs and to expansions (that is, increases in animal numbers or manure production) of existing CFOs.

Each of the policies is quoted (in italics) and discussed further below.

As another preliminary matter, policies 8-10 all refer to the term “minimum distance separation (MDS)”. The MDP does not define this term; I presume that it refers to the MDS requirements under AOPA.

8. *Ensure that each confined feeding operation (CFO) meets the minimum distance separation (MDS).*

Under NRCB policy, approval officers should not consider MDP provisions that are based on or modify the MDS requirements under AOPA. (See Operational Policy 2016-7: *Approvals*, part 8.2.5). That said, Lundberg’s application meets the MDS requirements under AOPA, so it is consistent with this policy (see technical document LA19053 for more details).

9. *Encourage each CFO to own the land included within the MDS.*

Lundberg’s proposed CFO does not meet this policy because there are other land owners within the MDS of the proposed CFO. However, this policy’s use of the word “[e]ncourage,” in contrast with the word “ensure” in policies 8 and 10, strongly suggests that this policy was meant to call for a discretionary judgement, rather than provide a hard and fast or non-discretionary rule. As such, this policy is not a “land use provision” under the NRCB’s interpretation of that term, as explained above.

In addition, this policy modifies the MDS provisions under AOPA which do not require a CFO owner to own all the land within the CFO's MDS.

For both of these reasons, I will not consider this policy.

10. *Ensure that the CFO and the MDS does not fall within a minimum of:*
 - 10.1. *3.2 km (2 miles) of any urban municipality or hamlet and does not encroach into any intermunicipal development plan boundaries*
 - 10.2. *0.8 km (1/2 mile) of a neighbouring dwelling*

Part of this policy enlarges and therefore modifies the MDS setback under AOPA by adding the 3.2 and 0.8 km setbacks in 10.1 and 10.2 to the MDS distance calculated under AOPA.

Therefore, this part of this policy is irrelevant to my MDP consistency determination.

The rest of this policy applies the 3.2 km and 0.8 km setbacks to the CFO itself. Lundberg's proposed CFO meets the 3.2 km setback to an urban municipality or hamlet in policy 10.1, but does not appear to meet the second part of this policy as it encroaches into an intermunicipal development plan boundary (IDP with the Municipal District of Willow Creek). This aspect of the MDP is not consistent with the IDP. As the Foothills County planner pointed out, the IDP does not mention confined feeding operations. Indeed the IDP has nearly no substantive land use policies. Given the surrounding language of this MDP policy (municipality, hamlet, dwelling), I interpret the intermunicipal plan boundary as identified in policy 10.1 of the MDP to refer to those IDPs with urban municipalities or hamlets. As such, I do not find the application to be inconsistent with this provision. The county's response to the application notice, including that the proposal substantially complies with the intent of the MDP (other than the nearby dwelling) appears to confirm this interpretation.

The CFO is also located within the 0.8 km setback in policy 10.2, from an existing residence. Therefore, Lundberg's proposed CFO does not meet this setback. Under NRCB policy, approval officers should not consider MDP provisions that are based on or modify the MDS requirements under AOPA. (See Operational Policy 2016-7: *Approvals*, part 8.2.5). As this provision attempts to directly apply a 0.8 km minimum distance setback to all residences regardless of CFO size, in my opinion it directly modifies the MDS under AOPA and therefore will not be considered in accordance with NRCB policy.

11. *CFOs should be located in an area where there will be minimal conflict with existing land uses and must take into consideration future expansion areas when looking at surrounding land uses.*

The "minimal conflict" and "consideration" tests in this policy section both require site-specific and CFO-specific judgements about the individual operation. For this reason, I would not consider this policy to be a "land use provision," so it is not relevant to my MDP consistency determination.

13. *Encourage CFOs on parcels of 160 acres or more.*

As with policy 9, this policy's use of the word "[e]ncourage" suggests that it was meant to call for a discretionary judgement, rather than provide a hard and fast or non-discretionary rule. As such, this policy is not a "land use provision" under the NRCB's interpretation of that term, as explained above.

The policy is also likely irrelevant under section 20(1.1) of AOPA, which precludes approval officers from considering MDP provisions “related to ... the site for a confined feeding operation....” At any rate, the CFO is on a parcel that is 160 acres, so policy 13 is satisfied.

Lundberg’s application is consistent with all of the other land use provisions of Foothills’ County MDP and therefore consistent with the MDP as a whole. The municipality’s response states the application is consistent with the MDP aside from the setback to a dwelling, which I determined I cannot consider, and therefore supports my conclusion.

For these reasons, I conclude that the application is consistent with the land use provisions of the Foothills Countys’ MDP. The municipality’s response confirms this determination.

APPENDIX B: Determining directly affected party status

The following individuals own or reside on land within the “affected party radius,” as specified in section 5(c) of the Agricultural Operation, Part 2 Matters Regulation:

Submitted Statement of Concern

- Jesper Jensen and Karin Madsen - NE 08-017-27 W4M
- Shawn Ottewell - NE 08-017-27 W4M

Submitted Statement of Support

- Clifford Slade - NE-34-016-28 W4M

Therefore, under NRCB policy, these individuals are presumed to be “directly affected” by the application. See NRCB Operational Policy 2016:7 – *Approvals*, part 6.2.

The following individuals who submitted responses to the public notice reside outside of the affected party radius. However, they may still qualify as directly affected parties based on their “exposure to potential nuisances or risks” posed by the proposed CFO (*Ijtsma*, RFR 2011-05, page 3):

- Deanne Kjinserdahl and Eric Kjinserdahl - NW-09-017-27 W4M
- Ronald Kjinserdahl and Heidi Kjinserdahl – NW 09-017-27 W4M

Under NRCB policy, a person has the burden of demonstrating that they are directly affected by an application. In order to meet their burden of proof, the person has to demonstrate that:

- A plausible chain of causality exists between the proposed project and the effect asserted;
- The effect would probably occur;
- The effect could reasonably be expected to impact the party;
- The effect would not be trivial; and
- The effect falls within the NRCB regulatory mandate under AOPA. (NRCB Operational Policy 2016:7 – *Approvals*, part 6.3; see also *Ijtsma*, page 4.)

Deanne Kjinserdahl and Eric Kjinserdahl have raised concerns relating to the impact manure spreading may have on adjacent organic farmlands in terms of weeds and disease, odors, flies, traffic, dust, noise pollution, land values, water allocation and use, water well impacts, potential for future expansion, and possible impacts of those with allergies/ respiratory issues.

Ronald Kjinserdahl and Heidi Kjinserdahl have raised concerns relating to the impact on water allocation and use, well impacts, odors, manure spreading, weeds and disease, land values and compensation potential, flies, traffic, loss of business as their yard is available for weddings, potential for feedlot expansion, and potential for impacts on quality of life.

I determined the nearest residence of the Kjinserdahl’s land parcel identified is over 2525 m from the proposed CFO and over 1650 m from the nearest manure spreading lands as identified in the application. AOPA sets the minimum distance of separation for this application as 568 m. This distance is measured from the edge of a proposed CFO facility to the edge of the nearest residence. This distance is generally considered the proxy for the perceived nuisance impacts

(such as odor, flies, dust, and noise) which may be expected. As the application exceeds the AOPA requirement for MDS by over 4 times, the proximity of the residences does not warrant inclusion as directly affected parties. As a result, the probability of a non-trivial effect that the Kjinserdahls' describe is very low.

The MDS values under the AOPA do not apply to manure spreading lands as this activity is seasonal, sporadic in nature, and the nuisance impacts associated with manure spreading are generally considered to be short term in nature. It should also be noted that though an operator must prove access to sufficient spreading lands for the year following issuance of an AOPA permit, they are not required to utilize these specific lands and other areas may be used. No matter where an operator decides to spread manure, all AOPA requirements for setbacks, nutrient limits, and record keeping must be maintained.

Additionally, though AOPA directly addresses risks which may be posed to groundwater (well related concerns), it is my opinion that the wells which may be used by these parties are sufficiently far away that the CFO should not pose a risk to them. In terms of water quantity, this does not warrant inclusion as directly affected as AOPA does not address water use or licensing. Water licensing falls under the purview of Alberta Environment and Parks (EP) and Lundberg will still require permits from that department.

Therefore, and as based on the five point test above, I have not found the above parties to have demonstrated the case to be included as directly affected parties under the AOPA. They did however raise many of the same concerns raised by directly affected parties. Discussion surrounding these concerns can be found in Appendix C, below.

APPENDIX C: Concerns raised by directly affected parties

1. Concerns from directly affected parties

The directly affected parties were concerned about the CFO's potential to:

- Increase dust and impact air quality
- Create odor, noise, insects and general nuisance impacts
- Reduce property values and what opportunity there is for compensation from applicant
- Reduce groundwater quality and volume, and what opportunity there is for financial compensation if an effect was to occur

The applicant provided a written response to the application he wished to have included in my decision. Mr. Lundberg's response follows:

"Thank you for your concern. The NRCB process is rigorous and will address many of the concerns.

With regards to water I have been working with a hydrologist to map water wells in our area. We have drilled 2 new wells into a different aquifer than what is currently being utilized within the area. These wells are 300 feet deep compared to the typical 180 feet. At the onset of this project water was one of my primary concerns also. It was essential to me that we take the necessary steps to be diligent in managing our fresh water resources.

I would be more than willing to discuss any of the other concerns at your convenience and can be reached at 403-852-8872.

Regards,

Chad Lundberg"

My (the approval officer) response to the following concerns follows below.

Increase dust and impact air quality

As noted in Technical Document LA19053, the proposed CFO exceeds the minimum distance separation requirement (MDS) under AOPA. This requirement is a means for reducing and mitigating impacts from noise, odour, dust, and other nuisance effects from CFOs.

Roads in agricultural areas may also generate dust. The NRCB has no direct responsibility for regulating road use. By contrast, under section 18 of the *Municipal Government Act*, counties generally have "direction, control and management" of all roads within their borders. Because the counties are best suited to managing road use, I will not speak further to road use and the potential for increases in road dust.

Create odor, noise, insects and general nuisance impacts

As explained above, the proposed CFO exceeds the MDS requirement under AOPA which relates directly to impacts from noise, odour, dust, and other nuisance effects from CFOs.

If, during any CFO's ongoing operation, the public has a concern related to a CFO creating unacceptable nuisance impacts, they can contact the NRCB's response line at 1-866-383-6722

and an NRCB inspector will follow up on the complaint. If a CFO is found to be creating an inappropriate disturbance, the NRCB may require the CFO to implement additional mitigation measures.

Reduced property values and what opportunity there is for compensation from applicant

In past review decisions, the NRCB's board members have consistently stated that concerns regarding effects on land or property values are "not a subject for [the board's] review under AOPA or for approval officers' consideration of permit applications." According to the board, impacts on property values are a land use issue which is a "planning matter dealt with by municipalities in municipal development plans and land use bylaws." (See, e.g. *Zealand Farms*, RFR 2011-02, p. 5).

AOPA also contains no provisions requiring CFOs to compensate neighbours financially for any potential impacts which may result from their operation.

Reduced groundwater quality and volume, and what opportunity there is for financial compensation if an effect was to occur

The Wood Engineering report has identified that the soils under the proposed pens and catch basin are suitable to be used as a naturally occurring protective layer as set out in the AOPA regulations. It is intended that the groundwater protection requirements in the legislation provide a suitable level of protection for groundwater in the province. Since the proposed CFO meets or exceeds these requirements it is assumed that sufficient groundwater protection is provided.

Water allocation or licensing and the potential for impacts on surrounding water users falls outside of the regulatory mandate under the AOPA. A copy of the application was shared with Alberta Environment and Parks which holds jurisdiction over water licensing. The applicant is reminded that sufficient water allocation must be secured prior to populating the CFO and any construction done prior to securing this licensing is at the operator's own risk.

As noted above, AOPA does not require CFOs to compensate neighbours financially for any potential impacts.

APPENDIX D: Explanation of conditions in Approval LA19053

Approval LA19053 includes several conditions, discussed below:

a. Construction Deadline

Chad Lundberg proposes to complete construction of the proposed new pens and catch basin by end of summer/fall 2021. Due to the time it takes to process permits under the AOPA, and to other unforeseen construction delays which may be encountered, three building seasons would be a more reasonable time frame for the proposed construction. The deadline of November 30, 2022 is included as a condition in Approval LA19053.

b. Post-construction inspection and review

The NRCB routinely inspects newly constructed facilities to assess whether the facilities were constructed according to their required design specifications. To be effective, these inspections must occur before livestock or manure are placed in the newly constructed facilities. Approval LA19053 includes a condition stating that Lundberg shall not place livestock or manure in the manure storage or collection portions of the new pens and shall not allow manure contaminated runoff to enter the catch basin until NRCB personnel have inspected the pens and catch basin and confirmed in writing that the facilities meet the approval requirements.