

## Decision Summary BA21002

This document summarizes my reasons for issuing Registration BA21002 under the *Agricultural Operation Practices Act* (AOPA). Additional reasons are in Technical Document BA21002. All decision documents and the full application are available on the Natural Resources Conservation Board (NRCB) website at [www.nrcb.ca](http://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.

Under AOPA this type of application requires a registration. For additional information on NRCB permits please refer to [www.nrcb.ca](http://www.nrcb.ca).

### 1. Background

On January 8, 2021, Tim Hofstra (Hofstra's Dairy) submitted a Part 1 application to the NRCB to expand an existing dairy CFO. The original dairy barn was lost to fire in 2020, which prompted this application.

The Part 2 application was submitted on January 27, 2021. On February 17, 2021, I deemed the application complete.

The proposed expansion involves:

- Increasing livestock numbers from 90 to 180 milking cows (plus associated dries and replacements)
- Constructing a new dairy barn – 43 m x 67 m (with a pit 4 m x 4 m x 4 m)
- Constructing a new synthetic lined liquid manure storage – 75 m x 44 m x 5.5 m
- Constructing a new solid manure storage pad – 25 m x 15 m

#### a. Location

The existing CFO is located at NE 33-48-23 W4M in Leduc County, roughly 7 km from the town of Rolly View, AB. The terrain is a rolling knob and kettle terrain with the nearest common body of water being a slough 40 m to the east across range road 233.

#### b. Existing permits

As the CFO existed on January 1, 2002, the CFO is grandfathered with a deemed registration under section 18.1 of AOPA. That deemed permit includes D99-181, issued August 27, 1999. This deemed registration allows for the expansion of the existing CFO to 68 milking cow (plus associated dries and replacements), and the construction of several facilities. The determination of the CFO's deemed permit status under section 18.1 of AOPA is explained in Appendix D attached. The deemed facilities are listed in the appendix to the Registration BA21002.

## 2. Notices to affected parties

Under section 21 of AOPA, the NRCB notifies (or directs the applicant to notify) all parties that are "affected" by a registration application. Section 5 of AOPA's Part 2 Matters Regulation defines "affected parties" as:

- In the case where part of a CFO is located, or is to be located, within 100 m of a bank of a river, stream or canal, a municipality entitled to divert water from that body within 10 miles downstream
- the municipality where the CFO is located or is to be located
- any other municipality whose boundary is within a 0.5 mile (805 m) from the CFO
- all persons who own or reside on land within the greater of 0.5 mile (805 m) or the minimum distance separation for the land on which the CFO is located

The notification distance is 0.5 miles. (The NRCB refers to this distance as the “affected party radius.”)

A copy of the application was sent to Leduc County, which is the municipality where the CFO is located.

The NRCB gave notice of the application by public advertisement in the County Market on February 17, 2021. The full application was made available for viewing on the NRCB website for public viewing. As a courtesy, 19 letters were sent to people identified by Leduc County as owning or residing on land within the notification distance.

### **3. Notice to other persons or organizations**

Under NRCB policy, the NRCB may also notify persons and organizations the approval officer considers appropriate. This includes sending applications to referral agencies which have a potential regulatory interest under their respective legislation.

Referral letters and a copy of the complete application were emailed to Alberta Health Services (AHS), Alberta Environment and Parks (AEP), Alberta Agriculture and Forestry (AF), and Alberta Transportation.

### **4. Municipal Development Plan (MDP) consistency**

I have determined that the proposed expansion is consistent with the land use provisions of Leduc County’s municipal development plan. (See Appendix A for a more detailed discussion of the county’s planning requirements.)

### **5. AOPA requirements**

With respect to the technical requirements set out in the regulations, the proposed expansion:

- 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/protective layers of manure storage facilities and manure collection areas

With the terms and conditions summarized in part 8, the application meets all relevant AOPA requirements.

## **6. Responses from the municipality and other directly affected parties**

Directly affected parties are entitled to a reasonable opportunity to provide evidence and written submissions relevant to the application, and are entitled to request an NRCB Board review of the approval officer's decision. Not all affected parties are "directly affected" under AOPA.

Municipalities that are affected parties are identified by the act as "directly affected." Leduc County is an affected party (and directly affected) because the proposed expansion is located within its boundaries.

Mr. Greg McGovern, a planner with Leduc County, provided a written response on behalf of the county. Mr. McGovern stated that the application is consistent with the county's land use provisions of the municipal development plan. The application's consistency with the county's municipal development plan, are addressed in Appendix A, attached.

Mr. McGovern also stated the application meets the minimum required setbacks required by the county's land use bylaw (LUB).

Apart from municipalities, an owner or occupant of land within the notification distance may request to be considered "directly affected." Two responses were received from 3 individuals. Under NRCB policy, because they are located within the notification distance and have submitted a timely response they are presumed to be directly affected. (See NRCB Operational Policy 2016-7: Approvals, part 6.2)

The following three individuals submitted statements of support for the application:

- Richard Rutherford
- James Wohl and Sylvie Pageau

## **7. Environmental risk of CFO facilities**

As part of my review of this application, I assessed the risk to the environment posed by the CFO's existing manure storage facilities and manure collection areas. I used the NRCB's environmental risk screening tool (ERST) to assist in my assessment of risk to surface water and groundwater (see NRCB Operational Policy 2016-7: Approvals, part 8.13). The tool provides for a numeric scoring of risks, which can fall within 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](http://www.nrcb.ca).)

All of the CFO's existing and proposed facilities pose a low potential risk to groundwater and surface water (The CFO's existing facilities are listed in the Appendix to Registration BA21002.)

## **8. Terms and conditions**

Registration BA21002 specifies the cumulative permitted livestock capacity as 180 milking cows (plus associated dries and replacements), and permits the construction of the dairy barn, solid manure storage pad, and synthetic lined liquid manure storage.

Registration BA21002 contains terms that the NRCB generally includes in all AOPA registrations, 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, Registration BA21002 includes conditions that generally address construction deadlines, document submission and construction inspection. For an explanation of the reasons for these conditions, see Appendix C.

For clarity, and pursuant to NRCB policy, I consolidated Leduc County Development Permit D99-181 with Registration BA21002 (see NRCB Operational Policy 2016-7: Approvals, part 10.5). Permit consolidation helps the permit holder, municipality, neighbours and other parties keep track of a CFO's requirements, by providing a single document that lists all the operating and construction requirements. Consolidating permits generally involves carrying forward all relevant terms and conditions in the existing permits into the new permit, with any necessary changes or deletions of those terms and conditions. This consolidation is carried out under section 23 of AOPA, which enables approval officers to amend AOPA permits on their own motion. Appendix C discusses which conditions from the historical permits are or are not carried forward into the new Registration.

## **9. Conclusion**

Registration BA21002 is issued for the reasons provided above, in the attached appendices, and in Technical Document BA21002.

Hofstra's Dairy deemed registration, and municipal development permit D99-181, are therefore cancelled, and their content consolidated into this Registration BA21002, unless Registration BA21002 is held invalid following a review and decision by the NRCB's board members or by a court, in which case the deemed registration and D99-181 will both remain in effect.

March 30, 2021

(Original signed)

Nathan Shirley  
Approval Officer

## **Appendices:**

- A. Consistency with the municipal development plan
- B. Responses from referral agencies
- C. Explanation of conditions in Registration BA21002
- D. Determination of deemed permit status

## APPENDIX A: Consistency with the municipal development plan

Under section 22 of AOPA, an approval officer may only approve an application for a registration or amendment of a registration if the approval officer holds the opinion that the application is consistent with the “land use provisions” of the applicable municipal development plan (MDP).

This does not mean consistency with the entire MDP. In general, “land use provisions” cover MDP policies that provide generic directions about the acceptability of various land uses in specific areas.

Conversely, “land use provisions” do not call for discretionary judgements relating to the acceptability of a given confined feeding operation (CFO) development. Similarly, section 22(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.”) “Land use provisions” also do not impose procedural requirements on the NRCB. (See NRCB Operational Policy 2016-7: Approvals, part 8.2.5.)

Hofstra’s Dairy CFO is located in Leduc County and is therefore subject to that county’s MDP. The county adopted the latest revision to this plan on June 23, 2019, under Bylaw #08-19.

Section 4.3.0.2 of the MDP lists planning objectives and policies for the county’s four agricultural areas. (The locations of these areas are shown on Map 4 of the MDP.) The existing CFO is in Area South Central/East. The MDP provisions applicable to Hofstra’s Dairy CFO are discussed below.

Section 4.3.0.2(c) states that the purpose of Agricultural Area South Central/East is “to provide for a broad range of agriculture including confined feeding operations. This area currently has a number of dairy operations that will be adversely impacted by significant increases in population and/or development.” This is likely a general guiding principle and is not considered a valid land use provision, therefore it’s not relevant to my decision.

Section 4.3.2 states that the county supports the development and expansion of CFOs provided the operation is compatible with the surrounding land uses. More specifically, section 4.3.2.1 states support for new or expanded CFOs provided the operation:

- a. does not create adverse impacts on environmentally significant lands;*
- b. has a satisfactory access;*
- c. is located within Agricultural Areas A, B or C,*
- d. is carried out in accordance with generally accepted farming practices regarding the storage, disposal and spreading of manure and the disposal of animal carcasses; and*
- e. meets the minimum setback distances to urban communities and residential development as regulated by the Agricultural Operation Practices Act.*

Section 4.3.2.1 (a) is likely not a land use provision because it requires site-specific, discretionary determinations (see NRCB Operational Policy 2016-7, *Approvals* 8.2.4). Therefore, this policy is not relevant to the MDP consistency determination required by section 22(1) of AOPA. At any rate, the application meets the “technical and locational” requirements of AOPA.

Section 4.3.2.1 (b) it is considered outside the mandate of AOPA. Additionally the county did not raise concern regarding this matter and the application was sent to Alberta Transportation for their review and follow-up. The applicant is reminded that they must comply with applicable Transportation requirements.

Section 4.3.2.1 (c) is met as the CFO and the application are located in Agricultural area C.

Section 4.3.2.1 (d) This part is likely not considered a “land use provisions,” as it is likely a CFO-related “test” under section 22(2.1) of AOPA. At any rate, the applicant has provided adequate spreading lands for manure management. The applicant must also adhere to all AOPA requirements.

Section 4.3.2.1 (e) the application meets the required minimum distance separation as set out by AOPA.

For these reasons, I conclude that the application is consistent with the land use provisions of Leduc County’s MDP that I may consider.

## **APPENDIX B: Responses from referral agencies**

This application was referred to AHS, AEP, Alberta Transportation, and AF as a courtesy and for their information as the referral agency may have a regulatory interest. Under AOPA referral agencies are not considered affected parties or directly affect parties for registration applications. Their responses are summarized.

### **a. Alberta Health Services (AHS)**

Ms. Anderson, an environmental health officer at AHS, sent a response raising questions regarding whether the NRCB is assessing the wells on site for potential contamination. The existing water well is located within 100 m of the existing grandfathered facilities. As explained above in section 7, risk screening of the entire site has been completed and all of the CFO's existing and proposed facilities score low risk to both groundwater and surface water.

### **b. Agriculture and Forestry's (AF) inspection and investigation section of the animal health and assurance branch**

Jeff Presley, an inspector, replied on behalf of AF. Mr. Presley stated they had no concerns with the application and requested that Hofstra's Dairy communicate with AF prior to and during construction of the proposed dairy barn. Hofstra's Dairy has been made aware of this request.

### **c. Alberta Environment and Parks**

An automated email response to the application was received from AEP, noting several legislations. Applicants must ensure they are meeting all applicable legislation and submit applications to Alberta Environment and Parks accordingly.

## **APPENDIX C: Explanation of conditions in Registration BA21002**

Approval BA21002 includes several conditions, discussed below, and carries forward a number of conditions from D99-191 (see sections 2 of this appendix). Construction conditions from historical D99-181 that have been met are identified in the appendix to Registration BA21002.

### **1. New conditions in Registration BA21002**

#### **a. Construction Deadline**

Hofstra's Dairy proposes to complete construction of the proposed new facilities by late 2021 or early 2022. This time-frame is considered to be unrealistic for the proposed scope of work and generally speaking 3 years provides for unforeseeable construction issues. Therefore, the deadline of December 1, 2023 is included as a condition in Registration BA21002.

#### **b. Post-construction inspection and review**

The NRCB's general practice is to include conditions in new or amended permits to ensure that the new or expanded facilities are constructed according to the required design specifications. Accordingly, Registration BA21002 includes conditions requiring:

- a. the concrete used to construct the liner of the manure collection and storage portion of the dairy barn and solid manure storage pad to meet the specification for category B (liquid manure shallow pits) and category C (solid manure – wet), respectively, in Technical Guideline Agdex 096-93 "Non-Engineered Concrete Liners for Manure Collection and Storage Areas."
- b. Hofstra's dairy to provide documentation to confirm the specifications of the concrete used to construct the manure storage and collection portions of the dairy barn and solid manure storage pad.
- c. A written completion report for the synthetically lined liquid manure storage, stamped by a professional engineer, certifying that the synthetic lined liquid manure storage has been constructed in accordance with the liner manufacturers' requirements. At a minimum, the report must confirm that the liquid manure storage is constructed in the approved location; confirm the size of the synthetic lined liquid manure storage, including depths above and below grade; and confirm that the synthetic liner was installed in accordance with the liner manufacturers' requirements, including under membrane surface preparation and proper sealing of any seams.

The NRCB routinely inspects newly constructed facilities to assess whether the facilities were constructed according to their required design specifications. To be effective, and to reduce risk to the operator, these inspections must occur before livestock or manure are placed in the newly constructed facilities. Registration BA21002 includes conditions stating that Hofstra's Dairy shall not place livestock or manure in the manure storage or collection portions of the new dairy barn, solid manure storage pad, or synthetic lined liquid manure storage until NRCB personnel have inspected each facility and confirmed in writing that they meet the registration requirements.

### **2. Conditions not carried forward from D99-181**

Registration BA21002 includes the terms and conditions in D99-181, except those noted below.

Pursuant to section 23 of AOPA (approval officer amendments), I have determined that

conditions 5 and 7 from D99-181 should be deleted and therefore are not carried forward to Registration BA21002. My reasons for deleting these conditions:

*5. The developer shall provide a manure management plan to the satisfaction of the Development Officer. The manure management plan shall be submitted prior to additional animals being placed on the lands in conjunction with this application.*

This condition is considered redundant as the Hofstras' Dairy are expected to comply with current AOPA legislation. The Codes of Practice were replaced by AOPA, which came into effect on January 1, 2002. For this application they have provided the amount of spreading lands required.

*7. The developer shall ensure that the development does not create any adverse impact on neighbouring properties.*

This condition is considered redundant as the Hofstras' Dairy are expected to comply with current AOPA legislation. The Codes of Practice were replaced by AOPA, which came into effect on January 1, 2002. Several of these requirements are designed to limit nuisance to neighbouring landowners. As noted above, the application meets all of AOPA's technical requirements.

## APPENDIX D: Determination of deemed permit status

Hofstra's Dairy claims that its CFO is grandfathered (that is, it has a "deemed" permit) under section 18.1 of AOPA. I am treating that as a request for a determination of deemed permit status. Under section 11(1) of the Administrative Procedures Regulation under AOPA, because I am cross-appointed as an NRCB inspector, I conducted an investigation into the deemed permit status of the CFO.

The investigation was to determine the capacity of the CFO that was in place on January 1, 2002.

The CFO was originally permitted by Leduc County on August 27, 1999 under development permit D99-181. This development permit allowed the expansion and operation of a dairy CFO to 68 milking cows (plus associated dries and replacements). This development permit is a deemed (i.e. grandfathered) registration under section 18.1(1)(b) of AOPA.

Under section 18.1(2)(b) of AOPA, a grandfathered CFO's deemed capacity (that is, the animal numbers allowed by its deemed permit) is the capacity authorized by the CFO's municipal permit. However, if the operator claims that the capacity on January 1, 2002 was more than the capacity authorized by the municipal permit, the NRCB interprets section 18.1(2) as allowing a grandfathered CFO's deemed capacity to be based on its physical capacity as of January 1, 2002. (See NRCB Operational Policy 2016-5: Determining Capacity for Grandfathered Confined Feeding Operations.)

The Hofstra's claims that its CFO's physical capacity on January 1, 2002 was 90 milking cows (plus associated dries and replacements), which is more than the above-stated capacity in its municipal permit. Therefore, to determine the CFO's deemed capacity, I must consider, among other things:

- a. What facilities existed at the site on January 1, 2002, including their dimensions, types of physical structures and other physical characteristics; and
- b. How each of those facilities was being used on January 1, 2002.

My consideration of facility usage includes the number and type of livestock in each facility and the purpose for the livestock's placement in each facility. I also consider how the facility was intended to be used through an entire livestock management period or cycle that included January 1, 2002. Evidence as to how the facilities were used in 2001 and previous years, and in the months and years following January 1, 2002, may be relevant to the two determinations listed above.

As required under section 11(2) of the Administrative Procedures Regulation, I provided notice to those parties who would be entitled to notice if this were an application for a new registration. In this case, that included the same radius as required for this expansion application.

The NRCB published notice of the deemed permit determination as part of the notice for the proposed Registration BA21002 application, in the County Market on February 17, 2021.

Under section 18.1(2)(a) of AOPA, if a CFO existed on January 1, 2002, the CFO's deemed capacity is its physical capacity to confine livestock on January 1, 2002 (See NRCB Operational Policy 2016-5: Determining Deemed Capacity for Grandfathered CFOs).

For determining capacity, I consulted standards from Technical Guideline Agdex 096-81: Calculator for Determining Livestock Capacity of Operations as They Existed on January 1, 2002.

In discussion with the applicant, the existing dairy barn had 82 stalls. Using a formula from the Agdex 096-81 for calculating dairy barn capacity, the claimed grandfathered capacity of 90 milking cows for the dairy barn is, reasonable. There are also several pens at the CFO indicating that the operation housed dries and replacements along with their milking cows.

Based on these findings, the CFO is considered to have a deemed registration and a deemed capacity of 90 milking cows plus associated dries and replacements.