

Decision Summary LA21033

This document summarizes my reasons for denying Approval LA21033 under the *Agricultural Operation Practices Act* (AOPA). Additional reasons are in Technical Document LA21033. 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.

Under AOPA this type of application would require an approval. For additional information on NRCB permits please refer to www.nrcb.ca.

1. Background

On June 14, 2021, Double H Feeders Ltd. submitted a Part 1 application to the NRCB to expand an existing poultry CFO by constructing two barns (87 m x 23 m each) and increasing chicken broiler numbers by 65,000 to a total of 120,000 birds.

The Part 2 application was submitted on September 13, 2021. On September 21, 2021, I deemed the application complete.

a. Location

The existing CFO is located at NE 22-9-22 W4M in Lethbridge County, roughly 1.8 km northeast of the Town of Coalhurst, Alberta. The terrain is sloping to the east. The closest common body of water is a drainage ditch that is connected to two neighboring quarter sections northeast and immediately east of the CFO. The proposed barns would be located to the south of the existing barns.

b. Existing permits

As the CFO existed on January 1, 2002, the CFO is considered to be grandfathered with a deemed approval under section 18.1 of AOPA. That deemed permit includes Lethbridge County Permit 98-189, issued December 29, 1998. This municipal permit allowed the conversion of a hog operation into a 50,000 chicken broiler CFO. The determination of the CFO's deemed permit status under section 18.1 of AOPA is explained in Appendix D, attached.

2. Notices to affected parties

Under section 19 of AOPA, the NRCB notifies (or directs 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:

- 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 person or 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 specified distance from the CFO, depending on the size of the CFO
- all persons who own or reside on land within a specified distance from the CFO, depending on the size of the CFO

For this size of CFO the specified distance is ½ mile. (The NRCB refers to this distance as the “affected party radius” or “notification radius.”)

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

The NRCB gave notice of the application by public advertisement in the Sunny South News on September 21, 2021. The full application was also posted on the NRCB website. As a courtesy, twenty six letters were sent to people identified by Lethbridge County as owning or residing on land within the affected party radius.

3. Notice to other persons or organizations

Under section 19 of AOPA, 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 Transportation, and the Lethbridge Northern Irrigation District (LNID).

The NRCB received a response from Jeff Gutsell, hydrogeologist with AEP; Alan Harrold, general manager of the LNID; and Leah Olson, Development and planning technologist with Alberta Transportation. No response was received from AHS.

Mr. Gutsell commented that AEP has not received an application from Double H for a water license under the Water Act and that there is no documentation about the source of water for this CFO. He continued to state that Double H has the potential to access water from the LNID and requested proof of adequate water availability prior to expanding this CFO. Because water needs for CFOs are not part of the NRCB’s mandate and jurisdiction, I will not further discuss this issue. However, a copy of AEP’s response has been forwarded to the applicant for his information and action.

Mr. Harrold stated in his response that Double H would require a water conveyance agreement to cover the demand for water. He also pointed out that manure storage and application is not permitted within 30 m of any canal or drain and that no effluent must enter the district works. Because water needs for CFOs are not part of the NRCB’s mandate and jurisdiction, I will not further discuss this issue. However, a copy of the LNID’s response has been forwarded to notify the applicant of this requirement.

Ms. Olson stated in her response that Alberta Transportation would consider this development to be an ancillary development and that her department has no concerns with this application.

4. Alberta Land Stewardship Act (ALSA) regional plan

Section 20(10) of AOPA requires that an approval officer must ensure the application complies with any applicable ALSA regional plan.

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.

5. Municipal Development Plan (MDP) consistency

I have determined that the proposed expansion is inconsistent with the land use provisions of Lethbridge County's municipal development plan. The reasons and a more detailed discussion of the county's planning requirements can be found in Appendix A, below.

Because of this inconsistency, in accordance with section 20(1)(a) of AOPA I must deny the application.

6. AOPA requirements

Despite the MDP inconsistency I continued to review the technical aspects of the application against the technical requirements set out in the regulations. The proposed expansion would:

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

7. Responses from 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." Lethbridge County is an affected party (and directly affected) because the proposed expansion is located within its boundaries.

Ms. Hilary Janzen, a senior planner with Lethbridge County, provided a written response on behalf of Lethbridge County. Ms. Janzen pointed out that the CFO is located within the identified exclusion zone as noted in the MDP but did not otherwise answer if the application is consistent with Lethbridge County's land use provisions of the MDP. She continued to state that this area is governed by the intermunicipal development plan (IDP) between Lethbridge County and the Town of Coalhurst which supersedes the MDP according to the *Municipal Government Act*. She

also stated that an approval should include a condition that requires the decommissioning of chicken barns that are located on the NW 22-9-22 W4 owned by the applicant. The application's consistency with Lethbridge County's MDP is addressed in Appendix A, attached.

Apart from municipalities, any member of the public may request to be considered "directly affected." The NRCB received responses from four individuals.

All of the four people who submitted responses own or reside on land within the 0.5 mile notification radius for affected persons. Because of their location within this radius, and because they submitted a response, they qualify for directly affected party status. (See NRCB Operational Policy 2016-7: Approvals, part 6.2)

The directly affected parties raised concerns regarding runoff, odor, manure spreading practices, and land value. These concerns are addressed in Appendix B.

8. 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.)

The assessment found that the existing and proposed poultry barns pose a low potential risk to groundwater and surface water.

9. Other factors

While I am denying this application due to inconsistency with the MDP land use provisions, I will consider other factors under section 20(1)(b) of AOPA in the event this decision is overturned following a Board review.

AOPA requires me to consider matters that would normally be considered if a development permit were being issued. The NRCB interprets this to include aspects such as property line and road setbacks related to the site of the CFO. (Grow North, RFR 2011-01 at page 2). Approval officers are limited to what matters they can consider though as their regulatory authority is limited. Accordingly, I considered the property line setbacks required by Lethbridge County's land use bylaw (LUB). I note that the application would meet those setbacks. This conclusion is supported by comments from the county.

AOPA requires me to consider the effects a proposed CFO or CFO expansion has on natural resources administered by provincial departments. To this end, I referred the application to AEP. Based on the response from the AEP representative whom I have corresponded with for this application, I am not aware of any statements of concerns for this CFO that were submitted under section 73 of the Environmental Protection and Enhancement Act or section 109 of the Water Act in respect of the subject of this application.

I am not aware of any written decisions before the Environmental Appeals Board in respect of the subject-matter of this application (<http://www.eab.gov.ab.ca/status.htm>, accessed October

29, 2021). Further, I am not aware of any written decision before a director under the Water Act.

Finally, I considered the effects of the proposed expansion on the environment, the economy, and the community, and the appropriate use of land.

Because the application meets all of AOPA's technical requirements, I presume that the effects on the environment are acceptable.

Consistent with NRCB policy (Approvals Policy 8.7.3), if the application is consistent with the MDP and with the LUB then the proposed development is presumed to have an acceptable effect on the economy and community. In my view, this presumption of acceptability is rebutted because of my determination that the application is not consistent with the MDP or the LUB in addition to the location of the CFO as discussed in Appendix A, attached.

I also presumed that the proposed expansion is not an appropriate use of land because of the inconsistency with the land use provisions of the municipal development plan (See NRCB Operational Policy 2016-7: Approvals, part 8.7.3.).

10. Conclusion

I am denying the application for the reasons stated above.

For information, the deemed permit determination outlined in Appendix D survives this denial decision. Under section 18.1(4) of AOPA, the terms and conditions of the deemed permit (including municipal development permit #98-189) will continue to apply.

November 25, 2021

(Original signed)
Carina Weisbach
Approval Officer

Appendices:

- A. Consistency with the municipal development plan
- B. Determining directly affected party status and concerns raised
- C. Conditions if an approval would be issued
- D. Determination of deemed permit status

APPENDIX A: Consistency with the municipal development plan

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

Double H’s CFO is located in Lethbridge County and is therefore subject to that county’s MDP. Lethbridge County adopted the latest revision to this plan on December 5, 2019, under Bylaw #19-043.

In this case, my opinion is that Double H’s application is not consistent with the land use provisions of the MDP.

Relevant to this determination are the following sections of the MDP:

Section 6.6 Confined Feeding Operations, in subsection 6.6.3:

a) Urban Fringe: *“The County shall exclude the development of CFOs in the Urban Fringe land use districts.”*

d) NRCB

IV) CFOs *“shall not be approved in the areas shown and designated on Figure 11B as exclusion areas”*.

The existing CFO is within the urban fringe zoning category, and is within this area as shown on Map 11B. I interpret ‘shall exclude development of CFOs’ in (a) as prohibiting not only the establishment of new CFOs, but also the development in the sense of expanding the existing CFO facilities or increasing permitted livestock numbers. With that, the application is not consistent with this section of the MDP.

d) NRCB

VI) *The NRCB should consider the requirements and regulations as stipulated in the Lethbridge County Land Use Bylaw and Animal Control Bylaw, including the exclusion of confined feeding operations on parcels less than the specified sizes as specified in those bylaws.*

In my view, this section – as well section 6.6.3(a)’s reference to land use districts – provides a clear intent to adopt provisions from the land use bylaw (LUB). Following the NRCB Operational Policy 2016-7: *Approvals*, part 8.2.3, I therefore also considered land use provisions in Lethbridge County’s Land Use Bylaw #1404 (consolidated to Bylaw 19-044 and Bylaw 19-032 (maps)). Under those bylaws, the subject land is currently zoned Rural Urban Fringe. CFOs are listed as a prohibited use under this zoning category.

Section 6.9.2 “Special Planning Areas” of Lethbridge County’s MDP identifies Objectives of special planning areas. Double H’s CFO is located in special planning Area A (Figure 14). The MDP states in part:

As the Town of Coalhurst and the City of Lethbridge increase development pressures in Area A, this area will become a distinct development node due to

limited access from the trade corridor and existing highway, as such, agricultural pursuits in this region may become financially and operationally challenging. CFO feeding operations will be discouraged in this area given the residential and commercial growth potential in this area.

In my opinion, for the above reasons, the application is not consistent with Lethbridge County's municipal development plan land use provisions. Under section 20(1)(a) of AOPA, if there is an inconsistency, the approval officer must deny the application.

In NRCB Operational Policy 2016-7: *Approvals*, part 8.2.3, approval officers are also to consider land use provisions in statutory plans, such as intermunicipal development plans, if the MDP cross-references them.

The Lethbridge County MDP does not mention the Lethbridge County-Town of Coalhurst IDP specifically, though the IDP was originally enacted (in 2014) prior to the most recent MDP revisions (2018, 2019). Lethbridge County and the Town of Coalhurst adopted the last amendment of its IDP in February 2021 under Bylaw # 20-023 and #421-20 (Bylaw # 1434 (Lethbridge County), #375-14 (Town of Coalhurst)).

In my view, the MDP cross-references IDPs generally but not sufficiently to be read as a cross-reference to this particular IDP. Section 6.10 of Lethbridge County's MDP discusses the contexts and policies in respect to the plans with the urban and rural municipalities within its borders, and mentions specifically the IDP between the City of Lethbridge and the County, and the challenges in respect to the development of the rural urban fringe between the two municipalities. Section 6.10.3(a) continues to discuss that the county shall "create, and respect through its decision making" IDPs with all the municipalities within Lethbridge County (see also Map 15). There is no specific cross-reference to the County of Lethbridge-Town of Coalhurst IDP.

Ms. Jansen, with Lethbridge County, rightfully stated in her response to this application, that the MDP is superseded by the IDP in the planning hierarchy as set out in the *Municipal Government Act*, to the extent of any conflict. However, the application to the NRCB to expand a CFO is processed under AOPA, not under the MGA. AOPA expressly singles out MDP land use provisions.

For these reasons, I did not consider land use provisions in the IDP. My analysis ends with the finding that the application is inconsistent with the land use provisions of the MDP.

APPENDIX B: Determining directly affected party status and concerns raised

The following individuals qualify for directly affected party status because they submitted a response to the application and they own or reside on land within the “affected party radius,” as specified in section 5(c) of the Agricultural Operation, Part 2 Matters Regulation:

Melissa Schmid
NW 23-9-22 W4

Bryan Clifton
NW 23-9-22 W4

A.W Bedster and spouse
SW 23-9-22 W4

See NRCB Operational Policy 2016-7 – Approvals, part 6.2.

The directly affected parties raised the following concerns:

- runoff from manure spreading lands and manure spreading practice,
- changing a watercourse,
- odor,
- reduced property value, and
- reduced quality of life.

Because this application will be denied, I need not discuss these concerns any further. However, as stated in section 9 above, the concerns relating to water that are under AEP’s jurisdiction have been forwarded to AEP for their information.

I would also like to point out that if a person or party has concerns regarding manure collection or storage facilities, manure spreading or other CFO related issues, those concerns can be reported to the NRCB’s 24 hour response line (1-866-383-6722). The call will be followed up on by an NRCB inspector. Neighbours and concerned parties can also call any NRCB office during regular business hours if they have questions about permit conditions or ongoing AOPA operational requirements.

APPENDIX C: Potential conditions if a permit is to be issued

If following a review hearing the Board overturns this decision and directs that a permit be issued, I would recommend that the conditions discussed below be considered. This would also include carrying forward a number of conditions from Development permit 98-189 (see sections 2 and 3 of this appendix).

1. Potential new conditions

a. Construction Deadline

I would recommend a condition setting out a reasonable construction completion deadline for the proposed work. Double H Feeders has proposed to complete construction of the proposed new poultry barns by January 1, 2026. This time-frame is considered to be reasonable for the proposed scope of work.

b. Post-construction inspection and review

The NRCB's general practice is to include conditions in new permits to ensure that the new or expanded facilities are constructed according to the required design specifications. Accordingly, it is recommended that a permit include conditions requiring:

- I. Double H Feeders to provide written proof from a qualified third party professional that the concrete used for the manure collection and storage area meets the required specifications as laid out in Agdex 096-93 – Category D.
- II. The inspection of approved facilities prior to livestock or manure being allowed to be placed in them.

2. Conditions to be potentially carried forward from Development permit 98-189

If an approval was issued, I would recommend carrying forward the terms and conditions in development permit 98-189, as noted below.

Pursuant to section 23 of AOPA (approval officer amendments), I would delete conditions # 2, and 4 from development permit 98-189 or only carry them forward in parts. My reasons are as follows:

Condition 2 – Land Area for Manure Utilization - states: " Maintenance of and/or access to approximately 350 acres of cultivated dryland or 148 acres cultivated, irrigated for manure utilization. Manure must not be applied to snow and/or frozen ground. Manure be incorporated within 48 h of land spreading, with consideration for neighboring residences, including a separation distance from such residences."

This condition consists of several parts.

The first part that determined the available land base for manure spreading is redundant and will be replaced by AOPA and its regulations that require a minimum of 963.7 acres of dryland or 483.3 acres of irrigated land for manure spreading, or alternatively, a nutrient management plan.

The second part, no spreading on frozen or snow covered ground, would also be redundant if a permit is issued since one of the standard conditions in a permit state:” *The permit holder shall comply with the requirements of the Agricultural Operation Practices Act (AOPA) and the regulations passed pursuant to that act.*” This would include section 24(5)(b) of the Standards and Administration Regulation.

The third part requires the incorporation of manure within 48 hours of land spreading. This part of condition 2 would be carried forward (as per NRCB’s Approval Policy 2016-1: Amending Municipal Permit Conditions) because it is more stringent than AOPA which allows application of manure on forage lands or directly seeded crops without incorporation.

The fourth part requires consideration for neighboring residences, including a separation distance from such residences during manure spreading. These terms are rather vague, subjective, and difficult to enforce. It is therefore more practical to follow the requirements of AOPA and its regulations (sections 24(5) Standards and Administration Regulation). This part of the condition would therefore be deleted and not carried forward.

Condition 4 – Dead Bird Disposal - states:” *Dead bird disposal is by burial. The burial pit shall only be used for dead birds. The burial pit must be fenced to exclude predators from having access to and removing dead birds from the pit, particularly during winter months. Dead birds must be covered on a regular basis during months the soil is not frozen. Acceptable storage of dead birds must be provided until sufficient quantities are attained for burial.*”

The disposal of deads is regulated directly by AF’s Regulatory Services Branch under the Animal Health Act. Given AF’s regulatory role, concurrent oversight of dead animal disposal by the NRCB would be inefficient and might lead to inconsistency with AF’s requirements. Therefore, I would delete this condition.

APPENDIX D: Determination of grandfathered permit status

Double H 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 grandfathered 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 constructed pursuant to a municipal development permit issued before January 1, 2002.

It is not clear when the CFO was originally permitted but it received development permit # 98-189 on December 29, 1998, from Lethbridge County, allowing a conversion from a hog CFO to a poultry CFO. This permit allowed the construction and operation of a chicken broiler CFO with 50,000 broilers.

Under section 11 of the Administrative Procedures Regulation, notice of a grandfathered permit determination is not required if the CFO was constructed pursuant to a development permit issued before January 1, 2002.

Under section 18.1(2)(c), the CFO’s deemed capacity is the capacity stated in the CFO’s development permit. Therefore, the CFO has a deemed capacity of 50,000 broiler chicken.

However the development permit does not list any facilities. I therefore determined the grandfathered footprint of this CFO using historical aerial photos:

As confirmed using aerial pictures taken between 1999 and 2003 (Valtus), the three existing broiler barns have not changed since these pictures were taken. The external measurements of the barns as listed by the applicant on page 1 of the Part 2 application (86.9 m x 11.9 m; 86.9 m x 13.4 m and; 86.9 m x 15.2 m) are confirmed.