

Decision Summary LA21047

This document summarizes my reasons for denying Approval LA21047 under the *Agricultural Operation Practices Act* (AOPA). Additional reasons are in Technical Document LA21047. 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 requires an approval. For additional information on NRCB permits please refer to www.nrcb.ca.

1. Background

On September 20, 2021, Opsterlawn Farms Ltd. (Opsterlawn) submitted a Part 1 application to the NRCB to construct a new 63,450 chicken broiler CFO with two broiler barns (98.5 m x 20.8 m each).

The Part 2 application was submitted on December 20, 2021. On January 12, 2022, I deemed the application complete.

a. Location

The proposed CFO is located at NE 29-10-16 W4 in the Municipal District (MD) of Taber, roughly 5 km north of the Town of Taber, AB. The terrain is generally flat with the Oldman River being located approximately 1.5 km to the west.

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

A copy of the application was sent to MD of Taber, which is the municipality where the CFO is to be located.

The NRCB gave notice of the application by public advertisement in a weekly newspaper in circulation in the community affected by the application. In this case, public advertisement was in the Taber Times on January 12, 2022. The full application was posted on the NRCB website for public viewing. As a courtesy, fourteen letters were sent to people identified by the MD of Taber 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 Taber Irrigation District. Responses were received from AEP, Alberta Transportation, and the TID. AEP and the TID provided information surrounding water licensing. The TID indicated that allocation is available for the operation. Alberta Transportation stated that a roadside development permit would be required. These responses were all provided to the applicant for follow up and action.

4. Alberta Land Stewardship Act (ALSA) regional plan

Section 20(10) of AOPA requires that an approval officer act in accordance with, and 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. In my view, the application does not adhere to the spirit of these non-binding parts of the SSRP, as it is inconsistent with the MD of Taber's MDP.

The SSRP recognizes AOPA as one of the legislative tools that implements the vision and strategies of that regional plan. SSRP strategic directions include efficient use of land, and strengthening communities by decision-maker collaboration with stakeholders. Section 8 ("Community Development"), which is part of the Implementation Plan of the SSRP, contains the following provisions:

"When making land-use decisions, municipalities, provincial departments, boards and agencies and other partners are expected to:

...

8.2 Address common planning issues, especially where valued natural features and historic resources are of interests to more than one stakeholder and where the possible effect of development transcends jurisdictional boundaries.

...

8.4 Work together to anticipate, plan and set aside adequate land with the physical infrastructure and services required to accommodate future population growth and accompanying community development needs. "

In my view, the exclusion zone as contained in the municipality's MDP constitutes good planning practice. As section 5 of this Decision Summary (below) explains, I am denying this application based on the proposed location being within a CFO-restricted area in the municipal development plan. I observe that my denial of this application for this reason honours the intent of the Implementation Plan and Strategic Plan of the SSRP."

5. Municipal Development Plan (MDP) consistency

I have determined that the proposed CFO is inconsistent with the land use provisions of the MD of Taber's municipal development plan (See Appendix A for a more detailed discussion of the county's planning requirements). On this basis, and in accordance with AOPA section 20(1)(a), I am required to deny the application.

6. AOPA requirements

With respect to the technical requirements set out in the regulations, 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 of manure storage facilities and manure collection areas

Aside from the inconsistency with the MD of Taber Municipal Development Plan land use provisions, the application would otherwise meet all relevant AOPA requirements.

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." The MD of Taber is an affected party (and directly affected) because the proposed CFO is located within its boundaries.

Mr. Ben Young, a planning and development officer with the MD of Taber, provided a written response on behalf of the MD of Taber. Mr. Young stated that the application is not consistent with the MD of Taber's land use provisions in their municipal development plan because it is located within a CFO exclusion zone. This is the basis of why I am denying the application. The application's consistency with the MD of Taber's municipal development plan is addressed in Appendix A, attached.

Apart from municipalities, any member of the public may request to be considered "directly affected." The NRCB received 12 responses from a total of 17 individuals.

The NRCB received all of the responses prior to the submission deadline in the public notice.

Of the 17 people who submitted responses, 7 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 are automatically assumed to be directly affected parties (See NRCB Operational Policy 2016-7: Approvals, part 6.2).

Ten of the respondents do not own or reside on land within the 0.5 mile radius for affected persons. Of these respondents, I consider none to be directly affected by the approval application based on AOPA requirements. Appendix B sets out my reasons for determining which respondents are directly affected.

The directly affected parties raised concerns regarding:

- Location within a municipal exclusion zone and restrictive covenant implications
- Air quality, odor, noise, flies, nuisance impacts
- Traffic
- Surface and groundwater impacts
- Property values
- Adequacy of notice and courtesy letter reach
- Temporary manure storage requirements and impacts of spreading
- Complaint process if approved

These concerns are addressed in Appendix C. As mentioned above, the first concern relating to the municipal exclusion zone is the reason I am denying the application.

8. Environmental risk of CFO facilities

New CFO facilities which clearly meet or exceed AOPA requirements are automatically assumed to pose a low risk to surface and groundwater. If the NRCB board was to overturn my decision, there are no site specific conditions of concern in relation to risk to surface water or groundwater.

9. Other factors

Even though the approval application is being denied for inconsistency with the MDP land use provisions, I still consider the following factors that are identified under section 20(1)(b). In the case the NRCB board decides to overturn my decision following a review hearing, I determined the application meets all other requirements of AOPA and its regulations.

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.

Mr. Young, indicated the application meets the setbacks required by the MD of Taber's land use bylaw (LUB). Mr. Young also confirmed the application is inconsistent with the MDP as the application is located within a CFO exclusion zone. In consideration of this and in my own interpretation of the MDP, in accordance with AOPA section 20(1)(a), I am denying the application.

Consistent with NRCB policy (Approvals Policy 8.7.3), I presumed that the effects in the environment would be acceptable because the application meets all of AOPA's technical requirements. In my view, this presumption is not rebutted.

Consistent with NRCB policy (Approvals Policy 8.7.3), if the application is consistent with the MDP 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 it is not consistent with the MDP land use provisions and, by the concerns expressed by the directly affected parties, and the fact the proposal is located in a CFO exclusion zone.

I also found that the proposed CFO is not an appropriate use of land because the application is inconsistent with the land use provisions of the municipal development plan (See NRCB Operational Policy 2016-7: Approvals, part 8.7.3

10. Terms and conditions

In the case the NRCB board was to overturn my decision, I have attached a list of recommended permit conditions (see Appendix D).

11. Conclusion

Approval LA21047 is denied for the reasons provided above, in the attached appendices, and in Technical Document LA21047.

March 4, 2022

(Original signed)
Joe Sonnenberg
Approval Officer

Appendices:

- A. Consistency with the municipal development plan
- B. Determining directly affected party status
- C. Concerns raised by directly affected parties
- D. Recommended conditions for Approval LA21047 if decision overturned by board

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).

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 20(1.1) 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.)

Opsterlawn’s proposed CFO is located in the Municipal District (MD) of Taber and is therefore subject to that county’s MDP. The MD of Taber adopted the latest revision to this plan on September 28, 2021 under Bylaw #1980.

Sections 5.1.13 – 5.1.15 of the MDP provide policies “related to confined feeding operations.” The stated purposes of these policies include providing the NRCB with “requirements that the council of the M.D. of Taber wish to have considered when applications for CFOs are evaluated for approval....”

The text in sections 5.1.13-5.1.15 is not clear as to whether these policies were intended to apply to applications for both new CFOs and for expansions of existing CFOs. However, a broad reading of these provisions suggests that they were meant to cover new CFOs as well as CFO expansions. Therefore, I presume these sections apply to the application.

Each of the applicable sections are discussed below.

Section 5.1.13

This section states that CFOs should be discouraged in the areas shown in Map 2 as “restricted”. This exclusion zone is a land use provision. Opsterlawn CFO is located within the “CFO restricted area” and is being denied on those grounds.

Sections 5.1.14(a)-(d)

These sections list setbacks for CFOs from roads and property lines. Opsterlawn’s proposed CFO is not within any of these setbacks.

Section 5.1.15

Under this section, the Municipal District requests that the NRCB consider the four following items:

- (a) the proximity of the operation to open bodies of water and the topography of the surrounding lands in order to minimize any negative impacts to drinking water supplies;

- (b) the cumulative effect of a new approval on any area near other existing confined feeding operations;
- (c) environmentally sensitive areas shown in the report, Municipal District of Taber Environmentally Sensitive Areas in the Oldman River Region;
- (d) give[ing] notice to adjacent landowners even in the case of applications for registration or authorization.

Neither (a) or (b) are likely “land use provisions,” as they call for site-specific judgements about the acceptability of an individual operation in light of certain criteria (“proximity,” magnitude and nature of cumulative effect, effect on environmentally sensitive areas). As such, these two MDP policies are not relevant to my MDP consistency determination. (See Operational Policy 2016-7: *Approvals*, part 8.2.5.).

At any rate, Opsterlawn’s proposed CFO meets requirements related to item (a), which refers to the impact of the operation on drinking water supplies. Several of the requirements under AOPA and its regulations are designed to prevent or minimize leakage from CFO facilities and thus to prevent manure from reaching and contaminating surface water and groundwater. Because the application meets these requirements, this facility would not pose a material risk to surface water or groundwater (and therefore potential drinking water supplies).

The CFO is not located in an environmentally sensitive area as indicated in item 5.1.15(c) above.

Policy 5.1.15(d) is a procedural requirement so it is likely not a “land use provision.” Therefore it is not relevant to my MDP consistency determination. At any rate, as explained above, in addition to notifying the Municipal District of Taber and several referral agencies, the NRCB also published official notice of the application in the Taber Times, and sent courtesy letters to landowners and residents within a 0.5 mile radius as identified by the MD of Taber (see also Operational Policy 2016-7: *Approvals*, part 7.4). The notification requirements under AOPA have been met.

For these reasons, I conclude that the proposed construction and establishment of a new CFO at this land location is inconsistent with the land use provisions of the Municipal District of Taber’s MDP. The Municipal District’s response supports my conclusion. In accordance with AOPA section 20(1)(a) I have therefore denied the application.

APPENDIX B: Determining directly affected party status

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 Operations, Part 2 Matters Regulation:

- Andrea Hargrove and Mitchell Gorgichuk
- John Nordquist
- Kelly Armstrong
- Maria and Jeffrey Hughes
- Randolph Spenrath

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

A person who is not specified in section 5 of the Part 2 Matters Regulation as an affected party can also qualify for directly affected party status. However, they have the burden to demonstrate they are directly affected by the application. The following individuals that submitted a response to the application may fall under this category:

- Brooke Andrus
- Bryan and Cassandra Valgardson
- Carrie Simek
- Denise and Paw Pedersen
- MacKenzie Simek
- Peggy and Harold Brown
- Tyler Platt

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 needs to demonstrate all the following five elements (see NRCB Operational Policy 2016:7 – Approvals, part 6.3):

1. A plausible chain of causality exists between the proposed project and the effect asserted;
2. The effect would probably occur;
3. The effect could reasonably be expected to impact the party;
4. The effect would not be trivial; and
5. The effect falls within the NRCB regulatory mandate under AOPA.

Using these factors, I conclude that none of the above individuals met their burden to demonstrate that they should be considered directly affected under the AOPA. Individuals claimed effects such as increased odors, impacts on wildlife, decreased property values, impacts on views, increased road use, and general effects on water/ environment. In my assessment, none of the individuals established a plausible chain of causality of any of these effects. Though there is a chance an effect may occur outside of the DAP radius if my decision was overturned following a board hearing, it is likely these effects would be of a minor nature.

None the less, the majority of concerns raised by these individuals were also raised by people who are automatically assumed to be directly affected by the application. Discussion of these concerns can be found in Appendix C, attached.

APPENDIX C: Concerns raised by directly affected parties

Concerns from other directly affected parties

The directly affected individuals raised the following concerns:

- Location within a municipal exclusion zone and restrictive covenant implications
- Air quality, odour, noise, flies, nuisance impacts
- Traffic
- Surface water impacts
- Ground water impacts
- Property values
- Adequacy of notice and courtesy letter reach
- Temporary manure storage requirements and impacts of spreading
- Complaint process if approved

Though I am denying the application, for the sake of efficiency in the event that the NRCB's board following a review hearing overturns my decision, I will provide responses to the concerns raised by the directly affected parties.

- Location within a municipal exclusion zone and restrictive covenant implications

As discussed repeatedly in this Decision Summary, in my interpretation, and as confirmed by the municipal response to the application notice, the proposed CFO is located within a CFO exclusion zone. Furthermore, some land units within this zone are under restrictive covenant and livestock are therefore not permitted on site. AOPA prescribes minimum livestock thresholds for permits under the act. Operations smaller than these fall within municipal regulations. Therefore, municipal rules around below threshold CFO's cannot be considered as part of this application. None the less, the application has been denied so this concern has been addressed.

- Air quality, odour, noise, flies, nuisance impacts

I have grouped these concerns together as in my interpretation they relate to the potential for nuisance impacts to arise from the proposed CFO. As noted in Technical Document LA21047, the proposed CFO meets the minimum distance separation requirement under AOPA to all residences. AOPA's minimum distance separation (MDS) is a means for mitigating odour and other nuisance impacts from CFOs. The NRCB generally considers the MDS as the distance beyond which the odours and other nuisance effects of a CFO are considered to be acceptable. That said, people residing beyond the MDS may still experience odours and other nuisance impacts from time to time.

In addition to odours from the CFO itself, odours and other nuisance impacts are also likely to occur when manure spreading takes place. However, the frequency of these exposures will likely be limited and of short duration.

In order to limit the nuisance impact of manure application on direct seeded or tame forage land, section 24 of the Standards and Administration Regulation precludes manure spreading without incorporation within 150 m of residences. Manure that is spread on conventionally tilled land must be incorporated within 48 hours. Setbacks and incorporation can help to minimize normal odours from manure spreading.

- Traffic

Concerns were raised relating to an increase in traffic and other traffic related impacts that may occur. The NRCB does not have direct responsibility for regulating road use. Section 18 of the *Municipal Government Act* gives counties “direction, control and management” of all roads within their borders. It is impractical and inefficient for the NRCB to attempt to manage road use through AOPA permits. (See Operational Policy 2016-7: *Approvals*, part 8.9. and Hutterian Brethren of Murray Lake, RFR 2020-09/LA20035). The application was also forwarded to Alberta Transportation, see section 3 of decision summary LA21047 for further discussion (above).

- Surface and groundwater impacts

As noted in the decision summary above, and documented in Technical Document LA21047, the proposed CFO facilities meet all AOPA technical requirements. AOPA requirements are designed to prevent or minimize manure leakage from CFO facilities and thus to prevent manure from reaching and contaminating groundwater and contaminating surface water.

During my site visit, I did not note any springs and water wells within 100 m, or common bodies of water within 30 m, of where the proposed CFO facilities are to be located.

Because the proposed CFO facilities meet or exceed these requirements, I concluded that the level of surface and groundwater potential risk posed by the proposal is low.

- Property values

Several respondents pointed out there are many high value residential developments immediately to the west of the application. The DAP’s suggest that as they are under restrictive covenant preventing livestock housing, and as such a CFO should not be permitted in the same area. In previous board decisions the NRCB’s board members have 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”. According to the board, impacts on property values are a land use issue, which is a “planning matter dealt with by municipalities in municipal plans and land use bylaws.”

- Adequacy of notice and courtesy letter reach

Section 2 of Decision Summary LA21047 (above), outlines the notice that was provided for the application. Notice requirements as required by AOPA were met for the application. Courtesy letters were only provided to the addresses as identified by the MD to be located within the 0.5 mile radius of the application.

- Temporary manure storage requirements and impacts of spreading

AOPA requires that CFO’s are able to store a minimum of 9 months of manure production. For poultry operations, this manure can be stored within the barn or at another site following AOPA’s regulations for short term manure storage. A separate manure storage is therefore not a requirement under AOPA. AOPA short term manure storage rules allow for manure to be stored for a maximum of 7 months over a 3 year period. Short term manure storage sites are not required to be permitted, but must meet certain requirements designed to protect both surface and groundwater and minimize nuisance. Should a party have concerns with respect to

the application or storage of manure they can contact the NRCB's 24 hour response line by calling 1-866-383-6722 and an inspector will follow up on their concern.

CFOs are also required to meet the manure spreading setbacks and to keep manure spreading and soil sampling records for the past five years and to provide them to the NRCB upon request. Together, the above requirements minimize the potential for manure constituents to leave the land on which they are applied, enter water bodies, or to impact soil in adjacent fields, and to minimize impacts on the surrounding environment.

- Complaint process if approved

Incidences of non-compliance or inappropriate disturbance related to a CFO or manure can be reported to the NRCB's 24 hour a day response line (1-866-383-6722 or 310-0000 toll free line). This applies to all CFO's and manure.

APPENDIX D: Recommended conditions for Approval LA21047 if decision overturned following a board review

If the NRCB board should direct an approval officer to issue an approval (following a board review), I recommend that the following conditions should be considered:

a. Construction Deadline

Opsterlawn proposes to complete construction of the proposed barns by the end of 2024. This time-frame is considered to be reasonable for the proposed scope of work. I would recommend a deadline of December 30, 2024 be included as a condition in the approval.

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, the approval should include conditions requiring:

- a. the concrete used to construct the liner of the manure collection and storage portion of the barns to meet the specification for category D (solid manure – dry) in Technical Guideline Agdex 096-93 “Non-Engineered Concrete Liners for Manure Collection and Storage Areas.”
- b. Opsterlawn to provide documentation to confirm the specifications of the concrete used to construct the manure storage and collection portions of the barns.

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. The approval should include a condition stating that Opsterlawn shall not place livestock or manure in the manure storage or collection portions of the barns until NRCB personnel have inspected facilities and confirmed in writing that they meets the approval requirements.