

Decision Summary RA22019

This document summarizes my reasons for issuing Approval RA22019 under the *Agricultural Operation Practices Act* (AOPA). Additional reasons are in Technical Document RA22019. 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 June 6, 2022, Bluffton Dairy Ltd. (Bluffton Dairy) submitted a Part 1 application to the NRCB to expand an existing dairy CFO.

The Part 2 application was submitted on September 21, 2022. On September 27, 2022, I deemed the application complete.

The proposed expansion involves:

- Increasing livestock numbers from 180 to 240 milking cows (plus associated dries and replacements)
- Constructing a dairy barn – 91 m x 36 m, with a liquid manure pit (4.3 m x 4.3 m x 4.0 m)
- Constructing a liquid earthen manure storage – 57 m x 57 m x 4.4 m deep
- Decommissioning the existing liquid manure storage facility and existing dairy barn

a. Location

The existing CFO is located at NE 23-44-03 W5M in Ponoka County, roughly 19 km north of the Town of Rimbey. The terrain is generally flat, with an overall slope to the south west. A seasonal water course is located approximately 258 m west of the existing facilities.

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. A grandfathering determination was completed by the NRCB on September 16, 2021 under PR21002. This deemed registration allows for the construction and operation of a 180 milking cow (plus associated dries and replacements) CFO. The determination of the CFO's deemed permit status under section 18.1 of AOPA is explained in the grandfathered (deemed) permit determination PR21002. The deemed facilities are listed in the appendix to the Approval RA22019.

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 Ponoka County, which is the municipality where the CFO is 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 Rimbey Review on September 27, 2022. The full application was made available for viewing during regular business hours and was posted on the NRCB website for public viewing. As a courtesy, eight letters were sent to people identified by Ponoka 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), and Alberta Agriculture, Forestry and Rural Economic Development (AFRED).

I also sent a copy of the application to Gull Lake Deer Creek Co-op, as a right of way holder.

Mr. Gordon Watt, a public health inspector, responded on behalf of AHS. Mr. Watt provided some general comments and concluded that AHS had no objection to this application.

Ms. Laura Partridge, a senior water administration officer, responded on behalf of AEP. Ms. Partridge indicated that Bluffton Dairy has made an application under the *Water Act*, and that the application process is in progress.

No other responses were received.

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.

There is no ALSA regional plan for the area where the existing CFO is located.

5. Municipal Development Plan (MDP) consistency

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

6. AOPA requirements

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

- Meets the required AOPA setbacks from nearby residences, with one exception (AOPA setbacks are known as the "minimum distance separation" requirements, or MDS). The owner of that residence has signed a written waiver of the MDS requirement to their residence
- 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 10, the application meets 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." Ponoka County is an affected party (and directly affected) because the proposed expansion is located within its boundaries.

Mr. Peter Hall, assistant chief administrative officer with Ponoka County, provided a written response on behalf of Ponoka County. Mr. Hall stated that the application is consistent with Ponoka County's land use provisions of the municipal development plan. The application's consistency with Ponoka County'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." No responses were received from any other person, organization, or member of the public.

The NRCB considers a person who owns a residence within the MDS of the CFO, and who waives the MDS requirements in writing to be automatically considered a directly affected (See NRCB Operational Policy 2016-7: Approvals, part 6.2). Josef Felder provided an MDS waiver, and is a directly affected party.

Two other parties submitted MDS Waivers; Johann Detlef and Lilli Rottmerhusen; and Brenda Denomme. However, because these parties' residences are not located within the required MDS, waivers are not required. Because of this, Mr. Detlef, Ms. Rottmerhusen, and Ms. Denomme are not considered to be directly affected parties.

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.)

New CFO facilities which clearly meet or exceed AOPA requirements are automatically assumed to pose a low risk to surface and groundwater. However, there may be circumstances where, because of the proximity of a shallow aquifer, or porous subsurface materials, an approval officer may require surface and/or groundwater monitoring for the facility. In this case a determination was made and monitoring is not required.

For the sake of efficiency, I first assessed the CFO's existing heifer barn and heifer pens using the ERST. These appear to be the CFO's highest risk facilities, because of their proximity to water wells. The existing liquid manure storage facility would normally be a higher risk facility; however, since it will be decommissioned, it was not included here. The assessment found that these facilities pose a low potential risk to groundwater and surface water. Because these are the CFO's highest risk facilities, I presume that the CFO's other existing facilities also pose a low potential risk to both groundwater and surface water. From a review of other information gathered in the course of this application, I am satisfied that the screening provided by the ERST is adequate and that the presumption is not rebutted. A further assessment of the risks posed by these other facilities, using the ERST, is not necessary.

9. Other factors

Because the approval application is consistent with the MDP land use provisions, and meets the requirements of AOPA and its regulations, I also considered other factors.

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. Hall did not list the setbacks required by Ponoka County's land use bylaw (LUB); however, he noted that the application meets all applicable planning documents.

I have considered the effects the proposed CFO expansion may have on natural resources administered by provincial departments. AEP has not made me aware of any statements of concern 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 decision of the Environmental Appeals Board for this location (<http://www.eab.gov.ab.ca/status.htm>, accessed November 24, 2022).

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

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

I also presumed that the proposed expansion is an appropriate use of land because the application is consistent with the land use provisions of the municipal development plan (See NRCB Operational Policy 2016-7: Approvals, part 8.7.3.). In my view, this presumption is not rebutted.

10. Terms and conditions

Approval RA22019 specifies the cumulative permitted livestock capacity as 240 milking cows (plus associated dries and replacements) and permits the construction of the dairy barn and liquid earthen manure storage.

Approval RA22019 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 RA22019 includes conditions that generally address construction deadlines, document submission, construction inspection, and decommissioning. For an explanation of the reasons for these conditions, see Appendix B.

11. Conclusion

Approval RA22019 is issued for the reasons provided above, in the attached appendices, and in Technical Document RA22019.

Bluffton Dairy's deemed registration is therefore superseded, and its content consolidated into this Approval RA22019, unless Approval RA22019 is held invalid following a review and decision by the NRCB's board members or by a court, in which case the deemed registration will remain in effect.

December 2, 2022

(Original signed)
Lynn Stone
Approval Officer

Appendices:

- A. Consistency with the municipal development plan
- B. Explanation of conditions in Approval RA22019

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.)

Bluffton Dairy’s CFO is located in Ponoka County and is therefore subject to that county’s MDP. Ponoka County adopted the latest revision to this plan on October 2018, under Bylaw #6-08 MDP.

Section 2 of the MDP contains eight numbered policies that relate to applications for new CFOs under AOPA. These eight policies are discussed below. (Three other MDP policies relate to CFOs below the AOPA permit threshold or to proposed residential developments near existing CFOs.)

Under policy 2.1, the county “encourages” the development of CFOs to add value to crop production and provide “more employment and income per acre of land.” However, policy 2.1 also states that the environment and neighbours’ rights “must be protected.” This policy likely isn’t a “land use provision,” but it provides a general context for interpreting and applying the other policies in section 2.

Policy 2.2 states the county’s “belief[] that very large CFOs are inappropriate in this part of Alberta, and requests the NRCB not to allow them here.” This policy defines “very large” as “more than ten times” the threshold for approvals in the Part 2 Matters Regulation under AOPA. In this case, a “very large” dairy CFO would have over 2000 milking cows. Bluffton Dairy’s proposed CFO is for only 240 milking cows, so the proposed CFO is consistent with this policy.

Policy 2.3 has two parts. The first part lists three setbacks and two exclusion zones for new or expanded CFOs. Bluffton Dairy’s CFO is not within any of these restricted areas.

The second part of policy 2.3 calls for “very strict conditions on manure handling and storage in the Chain Lakes and Maskwa Creek watersheds. This policy likely isn’t a “land use provision” because it calls for discretionary judgements about what conditions are “very strict.”

In addition, this policy may well be precluded from my consideration under section 20(1.1) of AOPA, which precludes an approval officer from considering MDP provisions “respecting tests or conditions related to the construction of or the site for a confined feeding operation or manure storage facility” and regarding the land application of manure. Regardless, the existing CFO

meets AOPA's technical requirements for manure handling and storage and those requirements are arguably "very strict." In addition, the CFO is not within either of these watersheds. Therefore, the existing CFO would be consistent with this section, if the section applied.

Policy 2.4 calls for the NRCB to "set strict rules for the timely incorporation of manure within a mile of any urban municipality or rural residence." This is a "test or condition" under section 20(1.1) of AOPA, so I am precluded from considering this policy. At any rate, Bluffton Dairy's CFO will be subject to the Standards and Administration Regulation under AOPA. This regulation arguably provides rules for the land application of manure, including timely incorporation in specified circumstances. These rules are arguably "strict," which is consistent with this MDP policy.

Policy 2.5 precludes the siting of CFOs within two miles of "any lake" unless the "regulators" are "convinced" that the CFO's manure management system is "fail-safe" and the CFO poses "no reasonable risk of contamination of the lake." Policy 2.5 is likely not a "land use provision" because its "fail-safe" and "reasonable risk" tests call for discretionary, CFO-specific judgements. The provision may also be a "test or condition," which I am precluded from considering by AOPA section 20(1.1). There are no lakes within 2 miles of the existing CFO, and therefore, the existing CFO would be consistent with this section, if the section applied.

Policy 2.6 precludes new or expanded CFOs where there is "any risk that runoff will contaminate domestic water supplies." Policy 2.6 likely is not a "land use provision" because it calls for discretionary judgements about acceptable risks. (On its face, "any risk" is a low risk threshold, but the threshold is presumably more than "minor" or "insignificant.") At any rate, the existing CFO meets AOPA's operational and construction requirements, which are designed to minimize the risks to surface and groundwater.

Policy 2.8 states that "where a *new* CFO is proposed, the minimum distance separation (MDS) should be contained entirely within land owned by the operator of the CFO." Policy 2.8 goes on to state that this requirement may be waived if the other party (neighbour) agrees to the MDS encroachment in writing.

Policy 2.8 uses, but essentially modifies, AOPA's MDS requirements by measuring the AOPA-derived minimum distance of separation to the edge of an adjacent landowner's property. In AOPA, the MDS is measured to the residential building located on that property rather than to the property line.

The NRCB's board (see *Wyntjes*, Board Decision 2007-11 at 6 et seq.) and approvals policy (see NRCB Operational Policy 2016-7: *Approvals*, part 8.2.5) have made it clear that approval officers should not consider MDP provisions that are based on, but modify and render more stringent, AOPA's MDS requirements. Thus, this policy cannot be considered for purposes of my MDS consistency determination. Regardless, Bluffton Dairy's application is for an existing CFO, therefore this section does not apply.

Last, 2.11 states that the county "may develop policies to reduce the nuisance caused by the spreading of manure near residences," including ones that require the immediate incorporation of manure and limits on the timing or rate of manure application. I am unaware of any manure application policies that the county has developed under policy 2.11. At any rate, section 20(1.1) of AOPA precludes me from considering policy 2.11 because it relates to manure application.

For these reasons, I conclude that the application is consistent with the relevant land use provisions of Ponoka County's MDP. As noted above, Ponoka County's response did not raise any concerns with this application, which confirms my conclusion.

APPENDIX B: Explanation of conditions in Approval RA22019

Approval RA22019 includes several conditions, discussed below:

1. New conditions in Approval RA22019

a. Construction above the water table

Section 9(2) of the *Standards and Administration Regulation* under the *Agricultural Operation Practices Act* (AOPA) requires the bottom of the liner of a manure storage facility or manure collection area to be not less than one metre above the water table of the site “at the time of construction.”

Bluffton Dairy’s engineering reports show that the water table varied, from 0.5 m to more than 9.0 m below grade. Based on this, it is difficult to determine if the proposed in-barn pit meets the one metre requirement of sections 9(2). Because the height of the water table can vary over time, the possible lack of adequate depth to water table indicated in Bluffton Dairy’s report does not mean that there will be an inadequate depth at the time of construction. To address this variability and ensure that the depth requirement is met at the time of construction, a condition is included requiring Bluffton Dairy to cease construction and notify the NRCB immediately if the water table is encountered during construction.

b. Construction Deadline

Bluffton Dairy proposes to complete construction of the proposed new dairy barn and liquid earthen manure storage by December 1, 2023. In my opinion, this time-frame may be too short for the proposed scope of work, given challenges in material availability. The deadline of December 1, 2024 is included as a condition in Approval RA22019.

c. 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, Approval RA22019 includes conditions requiring:

- a. the concrete used to construct the liner of the manure collection and storage portion of the dairy barn to meet the specification for category B (liquid manure shallow pits) and category C (solid manure – wet); in Technical Guideline Agdex 096-93 “Non-Engineered Concrete Liners for Manure Collection and Storage Areas.”
- b. Bluffton Dairy to provide documentation to confirm the specifications of the concrete used to construct the manure storage and collection portions of the milking barn.

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. Approval RA22019 includes a condition stating that Bluffton Dairy shall not place livestock or manure in the manure storage or collection portions of the new dairy barn and shall not place manure in the liquid earthen manure storage facility until NRCB personnel have inspected the dairy barn and liquid earthen manure storage facility and confirmed in writing, that they meet the approval requirements.

d. Decommissioning

The applicant has proposed to finish decommissioning the partially decommissioned water well ID 473632, located in the existing milking cow barn. A condition will be added requiring the applicant to provide documentation that the decommissioning was completed.

The applicant has also proposed to decommission the existing liquid manure storage facility, and the existing dairy barn. A condition will be added requiring the applicant to complete the decommissioning according to NRCB standards.