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CONSTRUCTION DEADLINES

Operational Policy 2015-1

Agricultural Operation Practices Act
February 19, 2015

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1. Background

The *Agricultural Operation Practices Act* (AOPA) requires permits to construct confined feeding operations (CFOs), and manure storage facilities and manure collection areas, but does not specifically impose deadlines for completing permitted construction. However, AOPA gives approval officers broad discretion to set permit terms and conditions. In the NRCB's view, this authority includes setting construction deadlines.

Under this authority, the NRCB has, for many years, had a policy of including construction deadline conditions in AOPA permits. This policy follows the practice of many municipalities who included construction deadlines in their permits for CFOs. (Municipalities were responsible for permitting CFOs before AOPA came into effect on January 1, 2002.)

The conditions in NRCB-issued permits set deadlines for the construction of manure storage facilities (MSFs) and manure collection areas (MCAs). (Permit applicants and other directly affected parties may request the NRCB's board members to review construction deadline conditions, as with all other permit terms and conditions.)

There are two reasons for construction deadlines. One reason is to support orderly development and land-use planning. AOPA does not prohibit new residential development adjacent to existing CFOs—i.e., the act does not have a legal effect on adjacent land uses. However, this may be the practical effect of issuing an AOPA permit, especially if a municipality has a “reciprocal MDS” (minimum distance separation) policy in their land use plan or bylaw. This effect may raise fairness issues, and create uncertainty for developers of adjacent lands, if a facility is permitted but never constructed.

The second reason for construction deadlines is to address the concern that, if a facility is permitted but not promptly constructed, the construction standards may change by the time construction actually starts. From a sound environmental management standpoint, manure storage facilities and manure collection areas should generally be constructed according to the most recent regulations and technical standards under AOPA. On the other hand, in order to obtain financing and properly plan their developments, operators need reasonable certainty as to the future requirements to be met. Construction deadlines address these competing concerns by providing a defined, rather than open-ended, time period in which operators have reasonable certainty with respect to required standards.

Since roughly 2006, NRCB policy has required permit conditions that address construction deadlines to state that the deadline can be extended by an approval officer, in writing, upon the permit holder's request. This type of condition is commonly referred to as a “flexible condition,” because it allows an approval officer to grant an extension without needing to amend the underlying permit and without providing additional public notice.

This policy is intended to ensure that construction deadline conditions can be enforced, and to support consistent initial deadlines and extensions granted by approval officers. However, this policy cannot realistically foresee and cover all possible construction deadline scenarios and circumstances. Thus, approval officers will continue to have to address unforeseen scenarios on a case-by-case basis through their broad discretion under AOPA to adopt permit terms and conditions.

Even for those construction deadline scenarios that are addressed in this policy, approval officers have discretion to modify this policy when its strict application would be manifestly unfair, or in other necessary and appropriate circumstances. To preserve this discretion, approval officers should continue to include “flexible” terms in construction deadline conditions, allowing approval officers to extend, in writing, the first and subsequent deadlines.

2. Adopting the initial construction deadline condition

Approval officers should continue to adopt construction deadlines in AOPA permits.

As in the past, permit application forms will continue to include entries for permit applicants to state proposed construction completion dates.

Applicants should be realistic in estimating their completion dates, by considering factors that typically affect the timing of construction, including weather, contractor availability, and financing.

The normal or default deadline set by approval officers for the development of a CFO should not exceed three construction seasons from the effective date of the permit. However, approval officers may set shorter or longer deadlines than three construction seasons, if warranted, based on the size or magnitude of proposed developments. For complex, multi-stage CFO developments, approval officers may also set staggered, or phased, deadlines for the construction of different facilities.

3. Handling requests for deadline extensions

Most CFO owners complete construction of their permitted facilities within the construction deadlines set in their permits. However, some owners require additional time to complete construction. Due to a variety of circumstances, a small number of operators require more than one extension of their construction completion deadline.

Sections 3.1 and 3.2 provide policy guidance that approval officers should refer to when considering whether to extend a construction completion deadline. For simplicity, the guidelines refer to permits with only one deadline. However, the guidelines also apply to requests to extend one or more separate deadlines in a permit for multiple facilities with staggered deadlines.

3.1 First extension of the construction deadline

If an operator anticipates that they will have trouble meeting their initial construction deadline, they can submit a written request for an extension of the deadline. However, that request must be submitted **before** the actual deadline date. (Section 4 below addresses the consequence if an operator fails to submit a timely request to extend the applicable deadline.)

As a courtesy, approval officers will attempt to notify operators roughly three months before an impending deadline. However, the NRCB stresses that this notice is provided only as a courtesy. It may not always be possible for the NRCB to provide this notice, so operators should not count on this notice as the sole or primary means of keeping track of their deadlines. **Operators are solely responsible for keeping track of the construction deadlines in their permits, and for either meeting those deadlines or submitting deadline extension requests before the deadline dates.**

In either case, when an approval officer receives an extension request, the approval officer should discuss the request with the operator to determine a practical and achievable extension of the construction deadline.

The need for additional time to construct permitted facilities can result from many unanticipated factors that can delay construction. Common examples of these factors are:

- weather
- changes in livestock markets
- problems in securing quota or financing
- availability of construction companies and/or access to materials

- difficulties in obtaining a water license
- personal crises

Approval officers have broad discretion to grant first-time extension requests (whether through a flexible condition or through a permit amendment, when there is no flexible condition), and are generally amenable to doing so. That said, the onus is on the permit holder to provide reasonable, written justification for an extension.

As a general rule, the first deadline should be extended for no more than the length of the original timeline. (For example, if the original construction completion deadline was three construction seasons, the extension can be for up to an additional three construction seasons.) However, there may be situations where an operator provides reasonable justification for a longer extension. In these situations, the deadline may be extended further. Likewise, approval officers are not obligated to grant an extension for the entire length of the initial timeline, especially if that initial timeline was a long one.

3.2 Second or further extension of the construction deadline

The onus is on operators to provide reasonable written justification for a second or further extension of their original construction deadlines. As with their consideration of requests for initial extensions, approval officers have wide discretion in deciding whether to grant second or subsequent extensions. The same factors listed in part 1, above, for initial extensions may, when reasonably demonstrated, warrant granting a second or further extension. Once again, these factors are meant as common examples rather than as the entire set of appropriate factors.

As with initial deadlines, approval officers will attempt to notify operators roughly three months before an impending second or further deadline. Once again, however, the NRCB stresses that this notice is provided only as a courtesy and operators are solely responsible for keeping track of their deadlines.

- **Construction underway**
In cases where an operator is requesting a second or subsequent extension to a construction deadline, and has already commenced construction, the approval officer has the discretion to grant an extension under the flexible construction condition (i.e., public notice not required prior to decision). However, that request must be submitted before the actual deadline date. The process used in these cases would be similar to the process outlined in part 1, above.
- **Construction not yet commenced**
In cases where no construction has begun, requests for second or further extensions must be made through an application to amend the permit for the relevant facility. These applications will be subject to whatever public notice was required for the original permit. (Under AOPA, applications for approvals and registrations require general public notice; applications for authorizations require notice to the municipality.)

4. Handling missed deadlines

In the NRCB's experience, operators have been diligent in meeting their initial construction deadlines or in submitting timely extension requests and then meeting their extended deadlines. However, in situations where operators miss their deadlines it is necessary to provide a clear process for addressing these circumstances, and to ensure that the deadlines are sufficiently enforceable so that they are meaningful.

A “missed deadline” means the subject facility has not been constructed by the deadline *and* the operator has not submitted a request to extend the deadline, before the deadline date. The following guidelines apply, whether the extension request should have been made in writing under a flexible condition, or through a written permit amendment application, and whether the missed deadline is the initial deadline or the first or a subsequent extension that has already been granted.

- If an operator does not submit an application for an extension by the deadline date (or if the operator notifies the approval officer that they no longer want to construct the subject facility), the approval officer should either amend the permit on their own motion (under section 23 of AOPA) or cancel the permit (under section 29 of AOPA).
- An “approval officer amendment” (under section 23) is warranted if the operator has constructed other facilities covered by the permit. In this case, the amendment should be written so that the permit no longer covers the un-constructed facility, but still covers those facilities that were constructed by the relevant deadline(s). The amendment should also reduce the livestock capacity to reflect the capacity of the remaining permitted facilities.
- The approval officer should cancel the permit altogether (under section 29) if the operator has not constructed *any* of the facilities covered by the relevant permit. If the operator does not consent to the cancellation, the approval officer can treat the permitted facilities as having been “abandoned,” and cancel the permit on that basis, under section 29(1)(b) of the act.

An operator may request that the NRCB’s board members review either a permit amendment or permit cancellation. If the board grants a review request, after holding the review the board may uphold, amend or overturn the approval officer’s decision.

5. Follow up steps when an approval officer denies a request to extend a deadline

In the event that an approval officer denies a request to extend construction deadlines for an operation, the approval officer shall either:

- amend the permit (under section 23 of AOPA) to exclude the un-constructed facility and reduce the livestock capacity accordingly, or
- cancel the permit altogether (under section 29 of the act), if there has been no construction at all.

An operator may request that the NRCB’s board members review either a permit amendment or permit cancellation. If the board grants a review request, after holding the review the board may uphold, amend or overturn the approval officer’s decision.

Contact the Natural Resources Conservation Board at the following offices. Dial 310.0000 to be connected toll free.

Edmonton Office

4th Floor, Sterling Place
9940 - 106 Street
Edmonton AB T5K 2N2
T 780.422.1977 F 780.427.0607

Calgary Office

19th Floor, Centennial Place
250 - 5 Street SW
Calgary AB T2P 0R4
T 403.297.8269 F 403.662.3994

Lethbridge Office

Agriculture Centre
100, 5401 - 1 Avenue S
Lethbridge AB T1J 4V6
T 403.381.5166 F 403.381.5806

Morinville Office

Provincial Building
201, 10008 - 107 Street
Morinville AB T8R 1L3
T 780.939.1212 F 780.939.3194

Red Deer Office

Provincial Building
303, 4920 - 51 Street
Red Deer AB T4N 6K8
T 403.340.5241 F 403.340.5599

NRCB Response Line: 1.866.383.6722

Email: info@nrcb.ca

Web address: www.nrcb.ca

Copies of the *Agricultural Operation Practices Act* can be obtained from the Queen's Printer at www.qp.gov.ab.ca or through the NRCB website.

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