



www.nrcb.ca

UNAUTHORIZED CONSTRUCTION

Operational Policy 2012-1

Agricultural Operation Practices Act

Updated, August 17, 2017

TABLE OF CONTENTS

- 1. Background and objectives 1
- 2. Definitions..... 1
 - 2.1 Construction..... 1
 - 2.2 Manure collection areas and manure storage facilities 1
- 3. Determining whether unauthorized construction has occurred..... 2
- 4. Responding to unauthorized construction..... 2
 - 4.1 Developing an unauthorized construction response plan..... 3
 - 4.2 Reviewing and finalizing the response plan 3

1. Background and objectives

Sections 13 and 14 of the *Agricultural Operation Practices Act* (AOPA) prohibit the construction, expansion, or modification of a confined feeding operation (CFO) or a manure collection or storage facility without an AOPA permit, if a permit is required under the act's Part 2 Matters Regulation. The NRCB considers these unauthorized activities as serious contraventions of AOPA.

The objectives of this policy are:

- provide guidance to NRCB field staff on what activities constitute construction under sections 13 and 14 of AOPA and the Part 2 Matters Regulation, and
- outline the process that NRCB field staff follow when unauthorized construction is identified.

Unless otherwise noted, this policy uses the term *construction* to refer to activities that include construction, expansion, or modification of manure collection or storage facilities at confined feeding operations. The policy uses the term *unauthorized* to mean an activity that requires but does not have an existing AOPA permit under the Part 2 Matters Regulation.

While the procedure described in this document should be followed in most instances, approval officers and inspectors have discretion to modify it where necessary and as appropriate. For example, there may be circumstances when NRCB field staff are on site when unauthorized construction is underway, and an immediate decision is required on whether to provide verbal direction to cease construction pending further investigation or consideration by the NRCB. In this circumstance, it may be impractical for the approval officer or inspector to follow each step of the process described below.

2. Definitions

2.1 Construction

AOPA does not define the term construction. However, section 1(1)(c) of the Part 2 Matters Regulation states that construction does *not* include “general maintenance” of a structure, CFO, or manure storage facility, or the “clearing and levelling of land.” The NRCB interprets *land* as including the specific land where a manure storage or collection facility or other CFO facilities will be located.

It is not possible to list every circumstance or type of work that constitutes construction, for purposes of considering whether an activity is construction. However, at a minimum, any pouring of concrete for manure collection or storage facilities, and any work to install a foundation for a CFO facility, or to dig an earthen manure storage for CFO facilities (other than clearing and levelling land), is generally considered to be construction and is therefore considered to be prohibited under AOPA unless it is allowed by a permit.

2.2 Manure collection areas and manure storage facilities

AOPA does supply definitions for both manure collection areas and manure storage facilities. Section 1(c.21) indicates that a “manure collection area” means the floor of a barn, the under-floor pits of a barn, the floor of a feedlot pen and a catch basin where manure collects but does not include the floor of a livestock corral. Section 1(c.3) indicates that a “manure storage facility” means a facility for the storage of manure, composting material, and compost, and a facility for composting, but does not include such facility at an equestrian stable, an auction market, a race track, or exhibition grounds.

3. Determining whether unauthorized construction has occurred

NRCB field staff may become aware of possible unauthorized construction in a variety of ways, including:

- A complaint or report by a third party
- Self-reporting by a CFO operator
- Site inspections by staff

If an approval officer comes across an issue that may involve unauthorized construction, they should contact an inspector as soon as practical. It may be appropriate to delay issuing any permits until the unauthorized construction issue has been resolved. It is the inspector's responsibility to determine whether unauthorized construction has occurred. However, in making this determination, the inspector should meet with the approval officer at the earliest practical opportunity to discuss the nature of the construction and whether it requires a permit under AOPA. Based on this discussion and further consideration, the inspector may decide that additional information from the municipality, the owner or operator, or other sources, is needed to make the determination and address whether

- the activity in question is construction,
- the construction is covered by an existing grandfathered or NRCB-issued permit, or
- the construction requires an AOPA permit.

If additional information is needed, the inspector, with input from the approval officer, should decide how it will be obtained, who will obtain it, and whether the inspector and approval officer should meet again to review the additional information.

The CFO owner/operator's intent may be a key factor in determining whether an activity is unauthorized construction under AOPA. For example, if a structure is intended solely to store tools or provide office space, its construction can commence (and be completed) without an AOPA permit. It is the operator's responsibility to ensure they have obtained any other permits.

Conversely, if a structure is intended for confining livestock, manure collection or manure storage, its construction should not commence without an AOPA permit even if the operator commits to not populate the facility with livestock until an AOPA permit has been issued. Thus, the inspector and approval officer should discuss what, if any, evidence they have regarding the operator's intent, and whether additional evidence is needed to adequately assess this factor.

The inspector may also contact the director of compliance and legal counsel for additional input if the determination is not totally clear. Inspectors are also encouraged to consult with their colleagues to see how similar circumstances have been handled in the past.

If the inspector decides that no further information is needed and that the activity in question was not construction, or that any construction was either already authorized or did not require a permit, the matter will be considered closed. This determination, together with reasons, must be entered into the NRCB's CFO database record for the operation.

If a compliance file is opened, the inspector must also ensure this determination is conveyed to the CFO owner/operator.

4. Responding to unauthorized construction

If the inspector determines that unauthorized construction has occurred, the inspector must develop a plan for responding to the unauthorized construction. To develop the plan, the inspector should

consult with the approval officer to identify any matters relevant to the approval officer's processing of future applications to permit the unauthorized facility.

4.1 Developing an unauthorized construction response plan

When developing a response plan, the inspector must follow the enforcement ladder outlined in the NRCB's compliance and enforcement policy. The compliance action taken will depend on a variety of factors, including:

- The nature and magnitude of the potential risk to the environment and to the surrounding community created by the unauthorized construction
- The operation's compliance history
- The economic and practical impact on the CFO of the enforcement action being considered
- Whether the CFO gained a financial benefit by commencing construction without first obtaining a permit
- Whether the operator self-reported the unauthorized construction
- The level of cooperation received from the operator

In each case where construction has occurred without an AOPA permit and a permit was required for that construction, the operator shall be informed that the unpermitted work they have undertaken has been done at their own risk. The operator may be subject to fines or penalties and may be required to decommission or deconstruct the unauthorized facility if it does not meet AOPA requirements.

In exceptional circumstances, an inspector may allow some aspects of the unauthorized construction to be completed if animal health or site safety issues are identified (for example, if a proposed water supply will also be used for existing livestock at the operation, or a construction crew needs to stabilize or conduct further work to secure part of a structure.)

4.2 Reviewing and finalizing the response plan

The inspector must inform the director of compliance of the unauthorized construction and the inspector's proposed response plan. The director may provide further input in consultation with the inspector.

The director may ask NRCB legal counsel to review the response plan. If the inspector is considering issuing a written compliance directive or enforcement order, or initiating prosecution, counsel must be involved as early as possible in the process.

If either a compliance directive or enforcement order relating to unauthorized construction is issued, the directive or order must be posted on the NRCB website as a public document and will not be removed from the website until all requirements of the directive or order are met. In addition, the municipality in which the CFO is located must be notified.

A response plan may require the operator to indicate how they will address the issues to bring the unauthorized construction into compliance, including timelines for compliance, and if and when the operator will apply for a permit. When a plan is required, the plan must be approved by the inspector before the operator can take further action. It is important to inform the operator that any application to bring an unauthorized construction situation into compliance will not be fast-tracked through the application process.

If the response plan involves issuing a compliance directive or enforcement order, the inspector shall consider incorporating the following requirements into the directive or order, where relevant and appropriate:

- a) If the facility is still under construction – the inspector may require the operator to stop construction until a permit is issued, especially if the liner has not yet been constructed.
- b) If the facility is constructed but not already populated with livestock – the inspector may require a permit to be issued before the facility is populated.
- c) If the facility is constructed and populated with livestock – the inspector may require the operator to depopulate the facility and remove all manure until a permit is issued. This can be a very burdensome obligation, and should only be imposed after careful consideration of the criteria listed in part 4.1 above.

If an operator refuses to bring the operation into compliance, additional enforcement action may be taken requiring the operator to:

- Depopulate the facilities within a reasonable time frame, as determined by the inspector,
- Remove any manure that has already been collected or stored in the facilities, within a reasonable time frame as determined by the inspector, and
- Cease using the facilities as a CFO and/or manure storage or collection area in the future. (Note that these facilities may be used for purposes other than housing livestock or manure storage – e.g. machinery storage.)

If there is considerable doubt that an operator will cease using an unauthorized facility for confining livestock (for example, a history of repeated violations, or previous directives or orders), it may be appropriate to require the operator to deconstruct the unauthorized facility. However, this remedy is extreme and should only be required when warranted.

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.

Copyright 2017