

## Decision Summary FA19003

This document summarizes my reasons for denying Approval FA19003 under the *Agricultural Operation Practices Act* (AOPA). Additional reasons are in Technical Document FA19003. All decision documents and the full application are available on the Natural Resources Conservation Board (NRCB) website at [www.nrcb.ca](http://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.

### 1. Background

On September 17, 2019, Hutterian Brethren of Hines Creek (1577912 Alberta Ltd.) (Hines Creek Colony) submitted a Part 1 application (to replace previous submitted and withdrawn application FA19001) to the NRCB to construct a new multi-species CFO. The Part 2 application was submitted on September 17, 2019. On October 9, 2019, I deemed the application complete.

The proposed CFO is for:

- 21,000 chicken layers (plus associated pullets),
- 5,000 chicken broilers,
- 500 geese,
- 1,000 ducks,
- 5 dairy milking cows (plus associated dries and replacements)(for personal consumption), and
- 300 turkey broilers

The proposed CFO facilities are as follows:

- Layer barn (93 m x 18 m)
- Layer barn manure storage pad (attached to layer barn) (12 m x 18 m)
- Pullet barn (54 m x 12 m)
- Pullet barn manure storage pad (attached to pullet barn) (12 m x 12 m)
- Broiler barn (30 m x 19 m)
- Multi-species barn (mixed poultry and dairy) (33 m x 21 m)
- Solid manure storage pad (30 m x 15 m)

The application also includes construction of an egg grading room, broiler barn office, and pullet barn office. These facilities are “ancillary structures,” under section 1(1)(a.1) of the Agricultural Operations, Part 2 Matters Regulation, because they will not be used to store or collect manure or to confine livestock. Therefore, under section 4.1 of that regulation, these structures do not need to be permitted under the act.

Under AOPA, this type of application requires an approval. (This is one of several types of “permits” issued under AOPA. For an explanation of the different types and when each one applies, see [www.nrcb.ca](http://www.nrcb.ca).)

#### a. Location

The proposed CFO is located at NE 4-85-5 W6M in Clear Hills County, roughly 12 km northwest

of the village of Hines Creek AB. The terrain is undulating with several sloughs in the immediate area. The nearest common body of water is a slough approximately 578 m to the northwest with the Montagneuse River being approximately 1,500 m to the northwest.

## **2. Notices to affected parties**

Under section 19 of AOPA, the NRCB is required to notify (or direct 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:

- the municipality where the CFO is 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 application, the distance is 0.5 mile. (The NRCB refers to this distance as the “affected party radius.”)

Municipalities that are affected parties are defined by the act to be “directly affected” and are entitled to provide evidence and written submissions. Clear Hills County is an affected party (and therefore also a directly affected party) because the proposed CFO is located within its boundaries.

A person who owns or resides on land within the affected party radius and who provides an MDS waiver is considered “directly affected” (see NRCB Operational Policy 2016-7: *Approvals*, part 6.2).

All other parties who receive notice of the application may request to be considered “directly affected.” Under NRCB policy, all individuals who own or reside on land within the affected party radius are presumed to be “directly affected” if they submit a written response to the notice within the prescribed timeline. (See NRCB Operational Policy 2016-7: *Approvals*, part 6.2.)

Under section 20 of the act, all directly affected parties are entitled to a reasonable opportunity to provide evidence and written submissions regarding the application.

All directly affected parties are also entitled to request an NRCB board review of the approval officer’s decision on the approval application.

The NRCB published notice of the application in the Fairview Post on October 9, 2019 and posted the full application on the NRCB website for public viewing. The NRCB also emailed referral letters and a copy of the complete application to Clear Hills County, Alberta Health Services (AHS), Alberta Environment and Parks (EP), and Alberta Transportation. Seven courtesy letters were sent to people identified by Clear Hills County as owning or residing on land within the affected party radius (two courtesy letters were returned as undeliverable).

## **3. Responses from the municipality and referral agencies**

I received responses from Clear Hills County, EP, AHS, and Alberta Transportation.

Ms. Bjorklund, a community development manager with Clear Hills County, provided a written response on behalf of the county. As noted in section 2, the county is a directly affected party.

Ms. Bjorklund stated that the application does not meet the required minimum municipal setbacks to existing rural residences or other minimum setbacks in the county's municipal development plan or land use bylaw. The application's consistency with the county's municipal development plan, is addressed in Appendix A, attached.

Mr. Burr, with EP, provided a written response to the application indicating that EP does not have any concerns with the application and that a water licence has already been approved for the proposed CFO.

Mr. Deol with AHS, provided a written response to the application indicating that AHS does not have any objections to the application. AHS' response included several comments and suggestions including that the operator should ensure they follow regulations regarding nuisance and general sanitation, disposal of dead animals, and Canadian drinking water guidelines. They also noted that they will work with the NRCB in the future should any concerns arise. These comments were provided to the applicant for their information.

Ms. Cobick with Alberta Transportation, provided a written response to the application requesting Hines Creek Colony to obtain a roadside development permit. This request was forwarded to the applicant for their follow-up.

#### **4. Responses from other parties**

Three statements were received from five people who do not own or reside on land within the 0.5 mile notification radius. As set out in Appendix B, none of these people are considered directly affected for this application.

#### **5. Environmental risk screening of existing and proposed facilities**

As part of my review of this application, I assessed the risk to surface water and groundwater posed by the CFO's proposed manure storage facilities. I used the NRCB's environmental risk screening tool for this purpose (see NRCB Operational Policy 2016-7: *Approvals*, part 8.13). The tool provides for a numeric scoring of risks, which can fall within either 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](http://www.nrcb.ca).)

All of the CFO's proposed facilities were determined to pose a low potential risk to groundwater and surface water.

#### **6. Other factors considered**

The application is inconsistent with the land use provisions of Clear Hills County's municipal development plan (MDP). As set out in section 20(1)(a) of the Act, I am obligated to deny an application that is inconsistent with MDP land use provisions.

However, it is possible that the NRCB Board may review my decision. The Board need have regard to, but (unlike approval officers) is not bound by, the MDP. In the event that the Board grants an approval of the application following a review, I have considered all technical requirements under AOPA. I have determined that the proposed CFO:

- Meets the required AOPA setbacks from all 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 of manure storage facilities

Under NRCB policy, if a proposed development is consistent with the land use provisions of the municipality's MDP, then the approval officer will presume that its effects on the economy and community are acceptable, and that is an appropriate use of land. (See NRCB Operational Policy 2016-7: *Approvals*, part 8.7.3) Because the colony's proposal is not consistent with setbacks and exclusion zone in the county's MDP, I cannot make this presumption.

Given that I am obligated to deny the colony's application on MDP inconsistency grounds, I cannot make a further determination on the CFO's effects on "the economy and the community" or whether the CFO is an "appropriate use of land." Therefore, these and other factors in section 20(1)(b) of AOPA will not be considered further.

## **7. Conclusion**

Approval FA19003 is denied because the proposed CFO is inconsistent with the land use provisions in Clear Hills County's MDP (in particular, Schedule G).

However, in case the NRCB's board members review my denial decision and decide that an approval should be issued, Appendix C, attached, provides my recommendations on the conditions I would include if a permit was issued.

January 31, 2020

(Original signed)

Nathan Shirley  
Approval Officer

## **Appendices:**

- A. Consistency with the municipal development plan
- B. Determining directly affected party status
- C. Recommended conditions (if the decision is overturned on appeal)

## **APPENDIX A: Consistency with the municipal development plan**

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

The NRCB interprets the term “land use provisions” as covering MDP policies that provide generic directions about the acceptability of various land uses in specific areas and that do not call for discretionary judgements relating to the acceptability of a given confined feeding operation (CFO) development. (See NRCB Operational Policy 2016-7: *Approvals*, part 8.2.5.) Under this interpretation, the term “land use provisions” also excludes MDP policies that impose procedural requirements. In addition, 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.”)

Hines Creek Colony’s proposed CFO is located in Clear Hills County and is therefore subject to that county’s MDP. The county adopted the latest revision to this plan on September 10, 2019, under Bylaw #243-19.

### **1. Municipal Development Plan**

Policy 3.1.2 of the county’s MDP specifically applies to CFOs and my analysis of this section is below.

#### **Subsection 3.1.2(a)-(c)**

Subsections 3.1.2(a)-(c) are considered planning principles for the purposes of permitting CFOs. They require CFO applications to meet the county’s MDP and policies and all relevant provincial regulations and policies. They also indicate that the NRCB should refer to the county’s public participation process. This is considered procedural in nature and therefore not considered a valid land use provision. At any rate, Public notice in accordance with AOPA was completed as a part of this application.

#### **Subsection 3.1.2(d)**

Subsection 3.1.2(d) states that the county will not support application of CFOs if the proposed development is incompatible with adjacent land uses and causes adverse health and/or environmental impacts. In this MDP, compatibility with adjacent land uses is likely established by the county’s use of exclusion zones (see discussion below on Subsection 3.1.2(f)).

Adverse effects on health and environment require site specific discretionary judgement as they are not clearly defined and therefore are not considered a valid land use provision. However, I note that the application meets all of AOPAs technical requirements which are designed to mitigate negative effects by both of these.

#### **Subsection 3.1.2(e)**

Subsection 3.1.2(e) is a planning policy for the county’s use when deciding if development permits or subdivision applications for residential development should be allowed within the minimum distance separation (MDS) of a CFO as determined by AOPA. Therefore, this policy is not relevant to my decision.

### **Subsection 3.1.2(f)**

Subsection 3.1.2(f) states:

*The development of the CFO's may be encouraged in areas that are not impacted by the exclusionary zones map or other restrictive policies.*

- i. The exclusion zones for confined feeding operations (CFO) shall be established by Schedule G.*
- ii. Notwithstanding the above, the County may relax the setback requirements if the proposal includes mitigative measures to limit negative impacts to adjacent land owners or environmental features, and to lessen the cumulative effects from nearby CFOs, as identified within an environmental assessment prepared by a qualified environmental professional.*
- iii. These provisions shall be in addition to provincial requirements within the Agricultural Operation Practices Act and Regulations, including the Agricultural Operation Practices Act (AOPA) R.S.A. 2000 C A-7, (AOPA) Administrative Procedures Regulation A.R. 106/2017, (AOPA) Standards and Administration Regulation A.R. 267/2001, AOPA Agricultural Operations - Part 2 Matters Regulation A.R. 257/2001, and the Manure Characteristics and Land Base Code, as amended from time to time.*

### **Approval Officer Conclusions to Policy 3.1.2(f):**

- i. The exclusion zones for confined feeding operations (CFO) shall be established by Schedule G.*
- i. Schedule G of the MDP is entitled "Confined Feeding Operations Permitted and Exclusion Areas." By colour coding, the quarter sections are indicated as CFO Exclusion Area, CFO Permitted Area, Abandoned CFO, Pending CFO, etc. According to the map in Schedule G, the quarter section on which the proposed CFO is to be located is marked as "pending CFO." In a follow-up call, the county's community development manager (and acting development officer) advised that the "pending" designation on Schedule G was just to indicate that an application to the NRCB had been submitted. It wasn't to indicate that a CFO should be necessarily sited at this land. Therefore, this proposed CFO would still be subject to all required setbacks and the CFO exclusion zone. With that guidance from the county, I read the "pending CFO" as in neither an excluded nor a permitted CFO area. Based on the colour coding of the surrounding area it is reasonable to conclude this location is located in the exclusion zone.

I also looked at the setbacks specified on Schedule G itself.

Schedule G indicates that the CFO exclusion zone is based on the following setbacks:

- 152.4 m from roads
- 3.2 km from residences
- 3.2 km from licensed CFOs
- 3.2 km from water bodies, rivers, streams, tributaries, wetlands

- 3.2 km from a Town/Hamlet
- 3.2 km from the Grimshaw gravels aquifer
- 3.2 km from intensive recreation areas
- 3.2 km from environmental sensitive areas

Because the location of the proposed CFO does not meet the setbacks to roads, residences, and waterbodies or wetlands it is my determination that it is located within a CFO exclusion zone. Therefore, the application is inconsistent with 3.1.2(f)(i) of Clear Hills County's MDP.

*ii. Notwithstanding the above, the County may relax the setback requirements if the proposal includes mitigative measures to limit negative impacts to adjacent land owners or environmental features, and to lessen the cumulative effects from nearby CFOs, as identified within an environmental assessment prepared by a qualified environmental professional.*

ii. This part is likely not considered a "land use provision," as it is likely a CFO-related "test" under section 20(1.1) of AOPA. Approval Policy at 8.2.6 says the NRCB interprets MDP provisions requiring environmental assessments as a "test or condition." In this case, section 3.1.2(f)(ii) of the MDP is a policy respecting conditions or tests related to the site for a CFO. Section 20(1.1) of AOPA prohibits me from considering it. At any rate, the application meets all AOPA technical requirements.

*iii. These provisions shall be in addition to provincial requirements within the Agricultural Operation Practices Act and Regulations, including the Agricultural Operation Practices Act (AOPA) R.S.A. 2000 C A-7, (AOPA) Administrative Procedures Regulation A.R. 106/2017, (AOPA) Standards and Administration Regulation A.R. 267/2001, AOPA Agricultural Operations - Part 2 Matters Regulation A.R. 257/2001, and the Manure Characteristics and Land Base Code, as amended from time to time.*

iii. This is not a land use provision. I note that the application is consistent with all technical AOPA requirements, including liner requirements. I note as well as that the facilities score low potential risk to surface water and groundwater. Additionally, where MDS is not met to the one residence, that owner as provided a written waiver.

### **Subsection 3.1.2(g)**

Policy 3.1.2(g) defines that setbacks shall be measured from the top of the bank of watercourses, high water mark for waterbodies, incorporated boundaries of communities, road right of ways, and boundaries of recreation sites. This policy appears to support the other policies by defining how the various setbacks should be applied, and is not itself a land use provision.

### **Subsection 3.1.2(h)**

Subsection 3.1.2(h) states:

*The County may recommend to restrict the development of a new Confined Feeding Operations (CFO) to a minimum of 3.2 km from an existing country residential development and an intensive recreation area unless the proponent provides proof of measures to be used on site that would mitigate negative impacts to the existing country*

*residential development, as identified within the required environmental assessment prepared by a qualified environmental professional.*

This is a policy that the county referred to expressly in its response letter.

I am required to determine what their definition of these developments are. There is no definition in the MDP; however the county's LUB defines "Country residential parcel" as "the rural subdivision of an undeveloped parcel from a quarter section for residential purposes." The county indicated that all residences fall under the category 'rural residence'. This is supported by the definition in schedule G in which the setback is referred to simply as "residences".

In the county's response, the county indicated that this policy is not met.

At any rate, this policy is likely not considered a "land use provision" that I can consider. By using the terminology of "may" and "recommend" if the applicant completes an environmental assessment, 3.1.2(h) is likely a CFO-related "test" under section 20(1.1) of AOPA (see discussion on 3.1.2(f)(ii) above). Additionally, under NRCB policy, approval officers should not consider MDP provisions that rely on or change the MDS formulas or MDS requirements under AOPA. (See NRCB Operational Policy 2016-7: Approvals, part 8.2.5). Therefore as this policy (and setback) directly modifies AOPA's MDS (of which is 315 m from residences zoned Category 1) I am not to consider this requirement.

### **Subsection 3.2.1(i) and (j)**

Subsection 3.2.1(i) and (j) are planning policies for the county's use when deciding if development permit or subdivision application for residential development or multi-parcel residential development should be allowed within 3.2 km of an existing CFO.

## **2. Land Use Bylaw**

NRCB Approvals Policy 8.2.3 and NRCB Board Decision 2015-01 Folsom Dairy Ltd., at pp 5-6 should consider a municipality's land use bylaw (LUB), if the text of MDP provides a clear intent to adopt an LUB. In my view, the MDP does not show a clear and direct intention to incorporate the LUB into the MDP. Several places throughout the MDP states that the LUB should be "amended" to be consistent with various policies throughout the MDP. I don't believe this shows with the clearest intention and wording a link between the two planning documents.



## APPENDIX B: Determining directly affected party status

The following individual who submitted an MDS waiver is considered to be a directly affected party. (See NRCB Operational Policy 2016:7 – *Approvals*, part 6.2.)

- Keith Johnson  
Pt. SW 10-85-6 W6M

Mr. Johnson did not otherwise submit a response to the application.

The notification radius for this size of application is 0.5 mile, which is prescribed by the regulations and based on the size of the CFO. Courtesy letters were mailed to all parties who live within the notification radius of the operation, based on the names and addresses provided by the county. The courtesy letters identify what is being proposed and when and where the official notice will be published. The official public notice was posted in the Fairview Post on October 9, 2019. Notice was also posted on the NRCB's website.

The following individuals who submitted responses to the public notice reside outside of the affected party radius and so are not “affected parties” under the regulation. However, they may still qualify as directly affected parties based on their “exposure to potential nuisances or risks” posed by the proposed CFO (*Ijtsma*, RFR 2011-05, page 3):

- Glen and Hope Hoover  
NW 9-85-5 W6M
- Peter and Joanne Frixel  
NW 32-84-5 W6M
- Terrie Wayland  
S½ NW 8-85-5 W6M

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 has to demonstrate all of the following:

- 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. (See NRCB Operational Policy 2016:7 – *Approvals*, part 6.3; see also *Ijtsma*, page 4., and RFR 2018-05 Summerland pages 3-4)

The concerns raised by these parties are summarized below:

- Notification radius
- Communication
- Odours
- Water usage and licensing
- Surface water contamination
- Surface water runoff

- Spreading lands
- Disposal of deads
- Agricultural practices
- Property values
- Region suitability
- MDP inconsistency
- Facility design

I have weighed whether the concerns raised meet all five elements on the test provided above for the individuals to meet their burden of proof for being directly affected by this application. After careful consideration and for the following reasons, in my view, none of the five individuals meets all five elements of the test.

The Hoovers state they live approximately one mile away. Mr. Wayland states the farthest edge of the development to his property line is 2.5 km, and some proposed manure spreading sites are about 800 m away.

The Frixels and Mr. Wayland expressed concern over the suitability of the region for this operation. This region is unique in surface soil by having a high clay content which does affect runoff. In this application a majority of the facilities are covered ensuring minimal contact between manure and water. The outdoor manure storage pad must be constructed and maintained to control run-on and runoff of manure, therefore any impacts on any of the parties by surface water contamination are not probable to occur.

All three statements expressed concern over odour. Odours and other related nuisances are determined to be acceptable by ensuring the minimum distance of separation is met. The proposed facilities meet the required MDS to all residences with the exception of one who has provided a signed waiver. None of the five individuals resides within MDS or within the 0.5 mile affected party radius. In my view, odours from the operation could not reasonably be expected to impact these individuals.

The Frixels and Mr. Wayland collectively expressed concerns over water licensing, disposal of deads, and agricultural practices. These matters are outside of the NRCB regulatory mandate. Water licensing is completed by Alberta Environment and in this instance the applicant has already obtained required licensing. The proper disposal of deads is enforced by Alberta Regulatory Services. AOPA does not regulate which types of agricultural practice are acceptable or the relationship between varying agricultural practices. It is expected that through good neighbour relationships, a respectful working relationship can be established. Similarly, specific facility designs such as the type of heating system to be used (queried by the Hoovers) are not regulated by AOPA. I have spoken with Hines Creek Colony regarding this and they are unsure at this point exactly what kind of heating system will be used.

The Frixels were concerned about setbacks to water bodies on spreading lands. Mr. Wayland appeared concerned about 800 m distance to proposed spreading lands. Manure spreading lands may change over time, and the operator must keep records to show where the manure has been spread. CFO operators must follow AOPA regulations regarding manure spreading, including setbacks. These regulations are designed to address surface and groundwater contamination as well as nuisances to nearby residences. Any effects due to spreading should

be limited and infrequent in nature, and any effect on the Frixels or Mr. Wayland would likely be minor.

All the individuals reckoned that their property values would decrease. In several review decisions, the NRCB's board members have "consistently 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 of permit applications. According to the board, impacts on property values are a land use issue which is a "planning matter dealt with by municipalities in municipal development plans and land use bylaws." (See, e.g. *Brad Towle*, RR 2017-09 page 3.) Therefore, this is outside of the NRCB mandate.

## **APPENDIX C: Recommended Conditions (if the decision is overturned on appeal)**

If the NRCB's board members were to review my denial decision and direct me to issue the Approval my proposed conditions are listed below.

### **a. Construction Deadline**

Hines Creek Colony proposes to complete construction of the proposed new CFO by fall 2023. This time-frame is considered to be reasonable for the proposed scope of work. Therefore I would include the following condition:

The permit holder shall complete construction of the layer barn with attached solid manure storage, broiler barn, pullet barn with attached solid manure storage pad, multi-species barn, and solid manure storage pad before December 1, 2023. Upon request, this deadline may be extended by the NRCB in writing.

### **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, I would include the following conditions for each of the facilities:

- the concrete used to construct the liner of the manure collection and storage portion of the layer barn with attached solid manure storage, broiler barn, pullet barn with attached solid manure storage pad, and multi-species barn 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.”
- Hines Creek Colony to provide documentation to confirm the specifications of the concrete used to construct the manure storage and collection portions of the layer barn with attached solid manure storage, broiler barn, pullet barn with attached solid manure storage pad, and multi-species barn.

The NRCB routinely inspects newly constructed facilities to assess whether the facilities were constructed according to their required design specifications. To be effective, these inspections must occur before livestock or manure are placed in the newly constructed facilities. Therefore, I would include a condition for each of the new facilities requiring Hines Creek Colony to not place livestock or manure in the manure storage portions of each facility until NRCB personnel have inspected each and confirmed in writing that they meet the Approval requirements.