From:	Fiona Vance
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Subject:	LA21037 A&D Cattle Review - Review Submissions of Approval Officer, Field Services
Date:	Thursday, May 26, 2022 12:24:49 PM
Attachments:	20220526 A&D Review Submissions of AO, Field Services.pdf TAB 1 Decision 2022-02 Double H Feeders Ltd. LA21033.pdf TAB 2 NRCB Approvals Policy (excerpted).pdf TAB 3 Decision 2004-05 Meinders Farm FA02001.pdf TAB 4 RFR 2018-11 500016 Alberta Ltd RA18016.pdf TAB 5 Standards & Administration Reg 267.2001 (excerpted).pdf TAB 6 Bengston v NRCB 2003 ABCA 173.pdf TAB 7 2020-2021 NRCB Annual Report (excerpted).pdf

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Good afternoon,

In relation to the Board Review on application LA21037 A&D Cattle Ltd., please find attached:

1. Review Submissions on behalf of the Approval Officer and NRCB Field Services; and
2. Seven authorities ("tabs") in support of the Review Submissions.

Please note: an index of the seven authorities appears at the last page of the Review Submissions.

On this message, I have blind-copied Mr. Huigenbos (A&D Cattle), Mr. Lewis, and Wade and Kaitlyn Conner. This selection is based on the Board's May 24, 2022 letter indicating eligible parties.

Regards,

Fiona N. Vance (*she/elle*)
Chief Legal Officer - Operations, NRCB
Fiona.Vance@nrcb.ca
(780) 422-1952

In the matter of a Review by

the Natural Resources Conservation Board

under section 25 of the *Agricultural Operation Practices Act*, RSA 2000, c A-7

to be held orally (virtually) on July 7, 2022

of a decision by an Approval Officer set out in Decision Summary LA21037

SUBMISSIONS OF

THE APPROVAL OFFICER AND

NRCB FIELD SERVICES

On behalf of the Approval Officer
and NRCB Field Services:

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Table of Contents

I. INTRODUCTION

1. This is two submissions, though for convenience we have assembled the two submissions under the same cover. The Chronology in Part II may assist in reviewing both submissions.

2. The submission in Part III is on behalf of NRCB Field Services and responds to the question posed by the Board in the RFR decision at items 1 and 2 (Scope of Review) on page 4 of Board Decision RFR 2022-06 (issued May 10, 2022). The submission in Part IV is on behalf of the Approval Officer and responds to the questions posed by the Board in RFR decision at item 3 under Scope of Review.

3. Neither Field Services nor the Approval Officer make any submissions on Scope of the Review items 4 or 5.

II. CHRONOLOGY

4. This information is drawn from Decision Summary LA21037, and from NRCB's CFO2 database. The Approval Officer will be available to respond to clarification questions at the virtual hearing on July 7, 2022.

5. On July 19, 2021, the NRCB received the Part 1 application for LA21037. The MD Willow Creek was notified.

6. On August 4, 2021, the NRCB received a Part 2 application. On August 9, the Approval Officer called the applicant and advised the applicant of information still needed.

7. On November 3, 2021, the Approval Officer visited the site. He advised the applicant of the total number of acres dryland that was needed available for spreading, and that a waiver needed to be dated.

8. On November 15 and 16, 2021, the Approval Officer advised the applicant he still needed the drilling report and the engineer's report.

9. On November 30, 2021, the Approval Officer had a phone call with the applicant, who wished to make some slight revisions.

10. On December 3, 2021, the NRCB received a revised Part 2 application.

11. On December 21, 2021, the NRCB sent out courtesy letters, which advised that public notice was coming on January 5, 2022.

12. On January 5, 2022, the application was deemed complete and public notice of the application appeared in the Macleod Gazette. The NRCB sent the complete application to MD Willow Creek, Alberta Health Services, Alberta Environment & Parks, and Alberta Transportation.

- See Decision Summary LA21037 at pages 1-2

13. On January 5 and 6, 2022, the Approval Officer discussed the application with the Manager of Planning & Development for the MD Willow Creek.

14. On January 14, 2022, the MD Willow Creek submitted its response to the application. In this letter, the MD Willow Creek advised in part:

> The Municipal Planning Commission would like to inform you that the Town of Fort Macleod and the Municipal District of Willow Creek No. 26 are currently in the process of developing an Intermunicipal Development Plan. The proposed CFO exclusion zone is currently on the table for discussion along with other matters. The subject lands, NE 27-08-26-W4M, for the proposed CFO may be within the proposed CFO exclusion zone. We are hopeful both municipalities will have a public hearing by the end of February, and both Councils making a decision. If the municipalities do not come to an agreement, the proposed IMDP will go before the Land and Property Right Tribunal (LPRT) for an appeal hearing on April 4, 2022.

- Letter dated January 14, 2022 from MD Willow Creek to Approval Officer, provided to the Board on April 29, 2022 (RFR proceeding)

15. February 2, 2022 was the deadline for responses to the application. The NRCB received three responses from the public. A few days later, the Approval Officer sent the compiled responses to the applicant and offered the applicant an opportunity to respond to them.

16. On February 10, 2022 the NRCB Board held a virtual hearing in the *Double H Feeders* Review.

17. On March 10, 2022, the applicant contacted the Approval Officer and advised there was an issue with where he drew the well in the application.

18. On March 14, 2022, the Approval Officer e-mailed the applicant seeking

a. details on the water well; and

b. identification of additional manure spreading lands.

19. On March 17, 2022, the NRCB Board issued its written reasons in Decision 2022-02 *Double H Feeders Ltd*. Among other things, the Board directed approval officers to determine consistency of an application with both the municipal development plan (MDP) and an intermunicipal development plan (IDP).

- Decision 2022-02 *Double H Feeders Ltd.* (LA21033), **Tab 1**

20. On March 18, 2022, the Director, Field Services – Applications notified the Approval Officer that he had learned the IDP between the Town of Fort Macleod and the MD Willow Creek had been passed by both municipalities.

21. On Monday, March 21, 2022, the Approval Officer contacted the applicant to advise of the IDP being passed.

22. The next day, upon query from the Approval Officer, the MD Willow Creek provided the IDP to the Approval Officer, noting that the MD Willow Creek's MDP had not been amended to reflect the IDP.

23. On April 1, 2022, the Approval Officer issued his decision denying the application. He considered the IDP and the *Double H Feeders* decision in Decision Summary LA21037 at, for example:

a. pages 2-3 under part 4 "ALSA regional plan";

b. page 3 under part 5 "MDP consistency";

c. page 6 under part 9 “Other factors”;

d. pages 7-10 in “Appendix A: Consistency with applicable municipal planning documents”; and

e. page 13 in Appendix C: Concerns raised by directly affected parties.”

III. SUBMISSION OF NRCB FIELD SERVICES

24. NRCB Field Services takes no position on whether the Board should exercise its authority to grant an approval for Application LA21037, or refuse to grant an approval.

25. At page 4 of its RFR decision, the Board asked a few questions of NRCB Field Services. This Submission is in response to those questions.

Scope of Review 1, first part

26. The Board asked Field Services to explain the part of the Approvals Policy directing approval officers to determine whether an application is consistent with the relevant MDP as of the decision date.

27. The NRCB Approvals Policy provides in part:

> **8.2.2 New and amended municipal development plans**
>
> In making MDP consistency determinations, approval officers will use the MDP in effect on the date they issue their permitting decision, even if it is not the same version of the MDP that was in effect when the Part 1 application was received.

- NRCB Operational Policy 2016-7: Approvals (updated May 8, 2018), **Tab 2** at part 8.2.2, page 25

28. There is no explanation for this direction within the Policy itself.

29. Within the legislation, AOPA at section 20(1) provides in part [underlining added]:

> 20(1) In considering an application for an approval or an amendment of an approval, an approval officer must consider whether the applicant meets the requirements of this Part and the regulations and whether the application is consistent with the municipal development plan land use provisions, and if in the opinion of the approval officer,

> (a) the requirements are not met or <u>there is an inconsistency</u> with the municipal development plan land use provisions, the approval officer must deny the application, or
>
> (b) …

30. The provision is written in the present tense – whether the application "is consistent" with the land use provisions, and if "there is an inconsistency" – but otherwise provides little guidance.

31. Some explanation for the Approvals Policy may lie in two Board decisions: Decision 04-05 *Meinders Farm* in 2004; and RFR 2018-11 *500016 Alberta Ltd.* in 2018.

32. In Decision 04-05 *Meinders Farm*, an amended MDP was passed 11 days before the permit decision was issued (a denial). The approval officer evaluated the application under the pre-amended MDP, but "indicated that the County's assessment of incompatibility also applied to the amended MDP." The Board wrote in part:

> … the Board agrees … that the consistency is with Section 20(1)(a) of AOPA. Since all parties agreed that the amended MDP was the law in force at the time the Board Review took place, the Board focused its attention on the compatibility of the application with the [amended] MDP. ….
>
> The Board understands that the purchase of property and the filing of an application for a proposed development do not, in themselves, create any vested rights for the purchaser to develop a CFO. In addition, there is no assurance that the MDP in place at the time the application is submitted will be the same MDP in place when the decision is made. The only crystallized entitlement granted by AOPA at the date of filing the application is the establishment of the required minimum distance separation for the proposed CFO.

- Decision 04-05 *Meinders Farm* (FA02001), **Tab 3** at pp 16-17

33. In RFR 2018-11 *500016 Alberta Ltd.* the county asked the approval officer to hold off issuing a decision until the county could adopt revisions to its MDP. The approval officer did not hold off. The Board declined to hold a review on this basis:

Should the approval officer have waited for Ponoka County's MDP amendments?

Both the Debra Stott and Shelley Wright RFRs assert that the approval officer acted inappropriately or in bad faith by issuing the RA18016 approval while the County was in the process of reviewing its MDP. Debra Stott's RFR indicated that some of the proposed amendments to the County's MDP may create a CFO exclusion zone that, if adopted, would include the proposed CFO site in the NE 34-43-26 W4M. The approval officer record includes a letter to the approval officer from Ponoka County dated June 26, 2018 asking that the approval officer defer her decision until "our planning review process is complete". The approval officer record also includes the County's May 4, 2018 letter to the Minister of Agriculture and Forestry asking for "a 90 day moratorium on further applications within this area to allow us the time necessary to complete our work." The Board notes that the approval officer record includes a letter from the Minister declining the County's request that the NRCB not issue decisions for a 90 day period.

The Board does not find bad faith in the approval officer's choice to issue a decision when the County was in the process of reviewing its MDP. The NRCB's written policy and past Board decisions both direct the use of the MDP in place at the time the approval officer decision is issued. Furthermore, the approval officer issued her decision during the early stages of Ponoka County's review process. The Board notes that the County's website shows a public information meeting for the MDP amendments slated for October 2, 2018, a full nine weeks after the approval office issued her decision. The Board finds that the approval officer's choice to issue her decision using the MDP under force at the time is entirely consistent with standing NRCB policy, was done in the ordinary course of business, and does not warrant Board review.

- RFR 2018-11 *500016 Alberta Ltd.* (RA18016), **Tab 4** at page 3 [underlining added]

Scope of Review 1, second part

34. The Board asked Field Services to explain whether the Approvals Policy "contemplates delaying decisions based on an MDP/IDP pending approval and implementation."

35. The Approvals Policy does not expressly contemplate a delay of a decision on this basis. At part 7.1.1, the Policy recognizes an approval officer's discretion in scheduling, and contemplates an applicant requesting a delay:

…. neither AOPA nor the regulations state when approval officers must make a final decision on a completed application. Approval officers generally try to make their decisions as soon as practicable, in part, to facilitate the applicant's business planning, and also given that the initial Part 1 application locks in the MDS date.

Approval officers have broad discretion for scheduling their decision process. This discretion includes deciding whether to delay a decision at an applicant's request. In some instances, approval officers can accommodate a delay request without changing their own decision schedule.

In other instances, applicants may request a delay well past the approval officer's planned decision date. In these instances, an approval officer will not grant a delay of more than six months past the approval officer's planned permit decision date. Approval officers will consider delay requests (up to six months) on a case-by-case basis, by assessing whether the applicant has provided a reasonable justification for the requested delay and whether the requested delay would be fair to the applicant and all other parties.

To make these assessments, approval officers will consider all relevant factors, including:

• how long a delay the applicant is requesting

• if the delay request is premised on the future occurrence of an independent event, how likely that event is to occur (e.g. the municipal council's revision of its MDP)

• the length of the application process, and causes for any delays in that process, up until the date the applicant made their request for delay. If an approval officer grants an applicant's request for a delay of one month or longer, the approval officer will provide notice of the delay to the municipality and to all parties that submitted statements of concern.

- NRCB Approvals Policy part 7.1.1, **Tab 2** at pages 14-15

Scope of Review 2

36. The Board seeks discussion on the relevance of two court cases (*City of Ottawa v Boyd Builders* (1965) SCR 408; and *Love v Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292) to decision making under Alberta's legislative scheme (AOPA and the MGA). Field Services' submissions will be limited.

37. In general, it can be said that the permitting process under AOPA shares some similarities with municipal development permitting – indeed, municipalities formerly permitted confined feeding operations prior to 2002. The AOPA permitting process also shares some similarities with approvals under the *Environmental Protection and Enhancement Act* and the *Water Act*. Alberta is the only province that regulates confined feeding operations with an arms'-length agency.

38. Since January 1, 2002, permitting of confined feeding operations has been regulated under AOPA, and has been removed from municipalities. Section 618(2.1) of the *Municipal Government Act* exempts confined feeding operations permitted under AOPA from Part 17, and from the regulations and bylaws under Part 17, of the MGA.

39. Outside of NRCB Board decisions, there is little judicial guidance on AOPA permitting. In 2003, in the early days of AOPA, the Alberta Court of Appeal issued written reasons in *Bengston v Alberta (Natural Resources Conservation Board),* 2003 ABCA 173, a case that touched on timing to set the minimum distance separation ("MDS").

40. As background, at that time, section 3(1) of the *Standards and Administration Regulation* under AOPA[1] provided in part:

> 3(1) An approval officer and the Board must not issue an approval or registration for a confined feeding operation or an authorization for a manure storage facility unless the minimum distance separation for the operation or facility <u>on the date the application is received by the Board</u> complies with this section.

---

[1] Today, section 3 of the *Standards and Administration* Regulation provides in part [underlining added]:

> 3(2) The minimum distance separation must be calculated using Schedule 1 as of the <u>date the application is received</u> by an approval officer or the Board.
>
> (3) Despite subsection (2), the minimum distance separation must be not less than 150 m as of <u>the date the application is received</u> by an approval officer or the Board.
>
> (4) On request by the applicant and <u>before the application is complete</u>, an approval officer must provide the applicant with a preliminary calculation of the minimum distance separation.

- *Standards and Administration Regulation* as it existed in 2002,[2] **Tab 5**

41. The full discussion by the single judge of the Court of Appeal is found at paragraphs 30-35. The judge:

a. observed the "clarity" of section 3 of the *Standards and Administration Regulation*;

b. noted that section 3 of the Regulation was supported by NRCB policy, and section 18(2) of AOPA;

c. recognized the intent of section 3 of the Regulation was "to provide certainty"; and

d. opined that section 3 of the Regulation was "not analogous" to the clause in question under *Love v Flagstaff* (where the word "proposed" was at issue).

- *Bengston v Alberta (Natural Resources Conservation Board),* 2003 ABCA 173, **Tab 6** at paras 30-35

42. This case may be of interest to the Board. However, *Bengston* is of limited assistance in this Review because:

a. it was a "leave" decision, which means the court was only looking at whether the question was seriously arguable and was not making a final determination on the issue; and

b. it interpreted part of the legislation that did provide "clarity" on the applicable date – to set MDS. The court did not interpret part of the legislation that did <u>not</u> provide guidance (such as which date to use to "set" the MDP).

IV. SUBMISSION OF THE APPROVAL OFFICER

43. The Approval Officer takes no position on whether the Board should exercise its authority to grant an approval for Application LA21037, or refuse to grant an approval.

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[2] The Court of Appeal decision in *Bengston* was issued on May 29, 2003. Note that on November 26, 2002 section 3 of the *Standards and Administration Regulation* was amended to add a transitional piece, but the provisions in question in *Bengston* were not amended.

44. At page 4 of its RFR decision, the Board asked a few questions of the Approval Officer. This Submission is in response to those questions.

Scope of Review 3

a. Did the Approval Officer delay the application?

45. There are two periods of time that seem to be the subject of this query: during December 2021, and between January 5 and April 1, 2022.

46. The December 2021 time period is addressed next in question b.

47. January 5, 2022 is when the application was deemed complete, and April 1, 2022 is when the Approval Officer issued his decision. Events between these dates are set out in Part II Chronology above. At no time did the Approval Officer deliberately delay processing the application.

48. The NRCB's internal goal for efficiency of the permitting process is that 85 percent of decisions be issued within 65 working days from the date the application is determined to be complete.

- NRCB Annual Report 2020-2021, **Tab 7** at page 13

49. In this case, the Approval Officer issued his decision 61 working days after the application was deemed complete.

b. What is the rationale for delaying permit notices for December 2021?

50. Related specifically to December 2021, Decision Summary LA21037 sets out the following rationale:

> The Part 2 application was submitted on December 3, 2021. On January 5, 2022, I deemed the application complete. This delay in timing was to accommodate the NRCB's holiday closure. This closure is intended to allow public notice to be completed at a time when neighbouring residents and land owners were likely to see the notice and when NRCB offices would be open to take inquiries.

- Decision Summary LA21037 at page 1

c.i. Did the Approval Officer delay in waiting for the *Double H* Board Decision?

51. The Approval Officer did not deliberately delay the processing of application LA21037 and was not waiting for the *Double H* Board Decision. The Chronology in Part II may assist in understanding what happened between when the applicant filed their Part 1 application and when the Approval Officer issued his decision.

c.ii. If so, was it appropriate to do so?

52. The Approval Officer did not delay in waiting for the *Double H* Board Decision.

V. CONCLUSION

53. NRCB Field Services and the Approval Officer take no position on the outcome of this Review.

54. One possible outcome appears to be the Board identifying a "currency" date for an MDP or IDP to be used to assess consistency of an application with land use provisions. If the Board is inclined to identify a date other than the date the decision is issued, Field Services would be grateful for a precise point, whether it be

a. the date the Part 1 application is filed with the NRCB;

b. the date the Part 2 application is filed with the NRCB;

c. the date the application is deemed complete; or

d. another certain date within the application process.

RESPECTFULLY SUBMITTED THIS 26th DAY OF MAY, 2022

Fiona N. Vance
Chief Legal Officer – Operations
Natural Resources Conservation Board

VI. TABLE OF AUTHORITIES

TAB	AUTHORITY
1	NRCB Board Decision 2022-02 *Double H Feeders Ltd.* (LA21033) Accessible at https://www.nrcb.ca/download_document/1/445/11329/nrcb-review-decision-2022-02-double-h-feeders-ltd-la21033
2	NRCB Operational Policy 2016-7: Approvals (updated May 8, 2018) [excerpted for part 8.2.2 at page 25 and part 7.1.1 at pages 14-15] Accessible at https://www.nrcb.ca/public/download/files/97525
3	NRCB Board Decision 04-05 *Meinders Farm* (FA02001)
4	NRCB RFR 2018-11 *500016 Alberta Ltd.* (RA18016), **Tab 4** Accessible at https://www.nrcb.ca/download_document/1/347/7667/rfr-2018-11-ra18016-500016-alberta-ltd-september-21-2018
5	*Standards and Administration Regulation* as it existed in 2002 [excerpted for section 3]
6	*Bengston v Alberta (Natural Resources Conservation Board),* 2003 ABCA 173 Accessible at https://www.canlii.org/en/ab/abca/doc/2003/2003abca173/2003abca173.html?resultIndex=1
7	NRCB Annual Report 2020-2021 [excerpted for page 13] Accessible at https://www.nrcb.ca/public/download/files/193140

NRCB | Natural Resources Conservation Board

BOARD DECISION

2022-02 / LA21033

Review of Decision Summary LA21033

Double H Feeders Ltd.

March 17, 2022

Table of Contents

The Board issues this decision under the authority of the *Agricultural Operations Practices Act* (AOPA), following the Board's review of Decision Summary LA21033 via a virtual hearing held on February 10, 2022.

1. BACKGROUND

Decision Summary LA21033 (Decision Summary), was issued by an NRCB approval officer on November 25, 2021, denying an application by Double H Feeders Ltd. (Double H Feeders) to construct two barns and increase chicken broiler numbers by 65,000 to a total of 120,000. The existing confined feeding operation (CFO) is owned and operated by Double H Feeders, and is located on NE 22-09-22 W4M, approximately 1.8 km northeast of the town of Coalhurst, Alberta (Town) in Lethbridge County (County).

For ease of reference within this document, the CFO site on NW 22-09-22 W4M proposed for **decommissioning** will be identified as the "west site", and the CFO site on NE 22-09-22 W4M proposed for expansion will be identified as the "east site".

> ***Note: CFO located on NW 22-09-22 W4M (west site) and capacity confirmation:*** *The Technical Document lists the one-time capacity of the west site as 50,000 broiler chickens. Given that the east site currently has a one-time capacity of 55,000 broiler chickens (Technical Document p. 2 of 32), the application to decommission the west site and to expand the east site to house a total of 120,000 broiler chickens represents a net capacity increase of 14% or 15,000 broiler chickens.*[1]

Pursuant to section 20(5) of the *Agricultural Operation Practices Act* (AOPA), a Request for Board Review (RFR) of the Decision Summary was filed by Double H Feeders within the 10-day filing deadline of December 16, 2021, established by AOPA. Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board (Board) consisting of Peter Woloshyn (chair), Sandi Roberts, L. Page Stuart, and Earl Graham was established to conduct the review.

The Board met on January 5, 2022. In its Decision Report RFR 2022-01 dated January 7, 2022, the Board advised that it had reviewed the RFR, determined that a review hearing was warranted, and that a one-day virtual hearing would be held. On January 10, 2022, a letter with the hearing details was sent to parties, advising that the hearing would use the Zoom platform, and would commence at 9:00 a.m. on February 10, 2022.

[1] The applicant asserted in both the Technical Document [p. 2 of 32] and the hearing [Hearing Transcript p. 83, 16-19] that the proposed expansion to the CFO on NE 22-09-22 W4M would result in a total increase of 5%; however, the Board notes that this calculated increase includes the capacity of a third Double H Feeders' site that is not a consideration in this application.

The Board identified the core issue for consideration at the hearing:

> ***Whether the Board should exercise its authority to approve the CFO expansion application, notwithstanding an inconsistency with the County's municipal development plan (MDP).***

The Board also identified a number of constituent elements that would contribute to its decision on that core issue (as listed on page 3 of Board Decision RFR 2022-01), and encouraged directly affected parties to consider these matters in their hearing submissions. These elements related to the following general areas:

- understanding municipal planning objectives
- the relevance of the Double H Feeders CFO located on NW 22-09-22 W4
- directly affected party concerns

Hearing submissions were received within the prescribed timelines from the Approval Officer/NRCB Field Services, Town of Coalhurst, Double H Feeders, County of Lethbridge, and Mr. Clifton. An additional filing request was made by Mr. Clifton after the January 27, 2022 hearing submission deadline, and was accepted in a preliminary decision issued by the Board on February 1, 2022. No rebuttals were received.

Parties to the review and their representatives are identified below:

Parties to the Review	Counsel/Representative
NRCB Field Services • Carina Weisbach, Approval Officer • Andy Cumming, Director, FS-Applications	Fiona Vance, Counsel
Double H Feeders Ltd.	Scott Van't Land, Operator
Lethbridge County	Hilary Janzen, Supervisor, Planning & Development
Town of Coalhurst	Diane Horvath, Town Planner
Mellissa Schmid	Mellissa Schmid
Mr. and Mrs. Bedster	Art Bedster
Mr. Clifton	Bryan Clifton

Bill Kennedy participated in the hearing as counsel for the Board. Additional staff support was provided by Laura Friend, Manager, Board Reviews; and Sylvia Kaminski and Carolyn Taylor, document management.

2. BOARD JURISDICTION

Where an approval application is appealed through the Board "request for review" process and the Board finds that a review is warranted, the Board's consideration of municipal development plans (MDPs) is addressed in AOPA section 25(4)(g):

> *25(4) In conducting a review the Board*
>
> > *(g) must have regard to, but is not bound by, the municipal development plan, . . .*

Although this affords clear discretion to the Board with respect to its consideration of MDPs, the Board is conscious of its responsibility to weigh carefully the planning objectives of municipal planning documents in relation to an application to develop or expand a CFO.

The Board has established that the following considerations are reasonable in a determination of whether a permit application is approved notwithstanding an inconsistency with the MDP presented as a CFO exclusion zone:[2]

- the municipal authority's rationale for establishing the relevant provision(s) in the municipal development plan,
- whether the relevant provision is reasonable and reflective of good planning,
- whether there is a direct link between the planning objectives and the establishment of the CFO exclusion zone, and
- whether the municipal development plan is in conflict with the AOPA objective of establishing common rules for the siting of CFOs across the province.

[2] 2011-04 Zealand Farms Ltd., 2016-01 Peters, 2017-08 Friesen & Warkentin

3. BOARD DELIBERATIONS ON THE MDP AND IDP

3.1 Hierarchy and Consideration of Municipal Statutory Planning Documents

The current *Municipal Government Act* (MGA) (Revised Statutes of Alberta 2000, Chapter M-26, current as of January 1, 2018) includes a clear hierarchy of municipal documents, where intermunicipal development plans (IDPs) prevail over conflicting provisions in municipal development plans (MDPs). In fact, IDPs are at the top of the hierarchy, while all other statutory plans relating to the area that an IDP covers must be consistent with the IDP:

> 632(4) A municipal development plan must be consistent with any intermunicipal development plan in respect of land that is identified in both the municipal development plan and the intermunicipal development plan.

Nonetheless, the MGA section 638(1) describes the case where a conflict or inconsistency between an IDP and MDP exist:

> Plans consistent
>
> 638(1) In the event of a conflict or inconsistency between
>
> (a) an intermunicipal development plan, and
> (b) a municipal development plan, an area structure plan or an area redevelopment plan
>
> in respect of the development of the land to which the intermunicipal development plan and the municipal development plan, the area structure plan or the area redevelopment plan, as the case may be, apply, the intermunicipal development plan prevails to the extent of the conflict or inconsistency.

AOPA section 20(1) provides very specific language directing approval officers to determine whether an application is consistent with the **municipal development plan** land use provisions. AOPA is silent on intermunicipal development plans, and there is no consideration of how to proceed in the case of conflict between municipal planning documents.

Views of Field Services

In its hearing submission, and during questioning at the hearing, Field Services indicated that, based on AOPA, approval officers determine whether an application is consistent with land use provisions solely based on the MDP. It was Field Services' view that it must strictly follow the language in AOPA and, as a consequence, approval officers must determine whether an application is consistent with the MDP and only the MDP. It was the view of Field Services that no other municipal planning documents may be considered.

However, an exception to this practice has developed over time, through Board decisions, that directs approval officers to consider other municipal planning documents if, and only if, "the municipal development plan [strongly] cross-references other planning documents."

In this case, the approval officer evaluated application LA21033 in relation to the County of Lethbridge MDP, and then the County's Land Use Bylaw (LUB), given there was a clear intent in the MDP to adopt provisions from the LUB.

Views of the County of Lethbridge and the Town of Coalhurst

At the request of the Board, both the County of Lethbridge and the Town of Coalhurst provided written submissions in addition to participating in the hearing. Given their consistency of views and that each submission makes multiple references to the other municipality, comments are attributed to either the Town or the County or the "municipalities".

In the case of Double H Feeders, the Board notes the municipalities' comments regarding the "paramountcy of the IDP policies", which County representative Ms. Janzen addressed at the hearing:

> *"…we follow the Municipal Government Act with regards to the hierarchy of statutory plans. As per the Municipal Government Act, the Intermunicipal Development Plan prevails over the County's Municipal Development Plan….*
>
> *…we'd always presumed that the NRCB understood that IDPs prevailed. When we would receive the applications, referral applications, they always asked if there was any other statutory documents that would impact a proposal. And so we include Intermunicipal Development Plans frequently in our comments to the approval officer….*
>
> *…[As] the county, we try very hard to ensure that we're planning and working with our adjacent urban municipalities, so Intermunicipal Development Plans are very highly ranked in the county in terms of enforcement, and we rely heavily on them…. we do hope that the NRCB will reconsider how they view those higher-level statutory documents going forward."*

When questioned about which statutory document would prevail in a situation like Double H Feeders, where the MDP lists an exclusion zone and the IDP provision is more relaxed, Ms. Janzen agreed that the IDP would prevail, as if the MDP has been amended by that IDP provision [Hearing Transcript p. 165].

Views of the Board

During closing argument, Field Services referenced the Supreme Court of Canada's decision *Rizzo & Rizzo Shoes Ltd*., 1998 1 S.C.R. 27, as a foundation for the modern approach to statutory interpretation which applies a "textual, contextual and purposive analysis of the statute or [the] provision in question". In consideration of the foregoing principle, the Board turned its mind to the hierarchy between the MDP, the IDP, and municipal land use planning documents.

Given section 638(1) of the MGA, the Board accepts that the IDP prevails over the MDP should an inconsistency between the two documents arise. The Board asserts that following the strict interpretation of AOPA and considering only the land use provisions found in municipal development plans (and not in intermunicipal development plans), has the potential to lead to an absurd outcome in the case where a conflict exists between and MDP and an IDP. Presumably it could also be the case where the MDP and IDP are generally consistent but the IDP provides more (or less) restrictive land use planning provisions related to the siting of CFOs.

Clearly, there is a need for approval officers to determine an application's consistency with planning provisions in both the MDP and IDP.

In the spirit of widely adopted statutory interpretation and common sense outcomes, the Board encourages Field Services to consider a more purposive approach to the interpretation of AOPA and its intent. It is the Board's view that AOPA intended approval officers to use what at the time was the highest order municipal planning document, the MDP. Recent changes to the MGA has changed the hierarchy of planning documents, and deference to land use provisions within the hierarchy of the municipal planning framework makes sense and is consistent with a purposive approach to interpreting AOPA. While speculative, presumably this situation exists only because AOPA has not been updated since the *Municipal Government Act* was amended in 2017 to include the revised hierarchy of municipal planning documents.

The Board suggests that in the future Field Services should also provide notice to municipalities identified in relevant IDPs.

3.2 Is the Application Consistent with the MDP?

In AOPA, section 20(1) directs approval officers to consider if an application is consistent with municipal development plan land use provisions, and to deny an approval application if it is found to be inconsistent with those provisions:

> *20(1) In considering an application for an approval or an amendment of an approval, an approval officer must consider whether the applicant meets the requirements of this Part and the regulations and whether the application is consistent with the municipal development plan land use provisions, and if in the opinion of the approval officer,*
>
> > *(a) the requirements are not met or there is an inconsistency with the municipal development plan land use provisions, the approval officer must deny the application, …*

In Decision Summary LA21033, the approval officer noted the following subsections of section 6.6 "Confined Feeding Operations", 6.6.3 "Policies" in the MDP (emphasis added):

a) Urban Fringe

I. "The County shall exclude the development of CFOs in the Urban Fringe land use districts."

d) Natural Resource and Conservation Board (NRCB)

IV. CFOs "shall not be approved in the areas shown and designated on Figure 11B as exclusion areas".

VI. The NRCB should consider the requirements and regulations as stipulated in the Lethbridge County Land Use Bylaw and Animal Control Bylaw, including the exclusion of confined feeding operations on parcels less than the specified sizes as specified in those bylaws.

Double H Feeders' east site CFO is located in the Urban Fringe zoning category identified on Figure 11B of the MDP. The approval officer interpreted the wording "shall exclude the

development of CFOs" as prohibiting both the establishment of new CFOs and the expansion of existing CFOs in the Urban Fringe land use districts.

The approval officer also identified that the east site is located in the special planning Area A referenced in section 6.9.2 "Special Planning Areas" of the MDP:

> As the Town of Coalhurst and the City of Lethbridge increase development pressures in Area A, this area will become a distinct development node due to limited access from the trade corridor and existing highway, as such, agricultural pursuits in this region may become financially and operationally challenging. CFO feeding operations will be discouraged in this area given the residential and commercial growth potential in this area.

As discussed earlier in this decision report, the approval officer evaluated application LA21033's consistency with the MDP and not the IDP. In that determination, the approval officer accepted that MDP sections 6.6.3(a) and (d)(VI) both provide "a clear intent to adopt provisions from the [Land Use Bylaw]", which identifies that the east site is zoned "Rural Urban Fringe" where CFOs are listed as a prohibited use.

The approval officer noted that the application met AOPA's technical requirements, but concluded that the application was "not consistent with Lethbridge County's municipal development plan land use provisions", denying the application in accordance with AOPA section 20(1).

In this case, the Board accepts the rationale for establishing the CFO exclusion zone in the MDP. As noted, the "Special Planning Areas" subsection 6.9.1 identifies that Special Area A "will become a distinct development node" and that "CFO feeding operations will be discouraged in this area given the residential and commercial growth potential in this area". The Board acknowledges that this provision is reasonable and reflective of good planning and that, given the proximity to the Town of Coalhurst, the objectives outlining the plan for a "distinct development node" appear to be consistent with County's listed objectives in the MDP section 6.1.2 to "direct land development to areas that are best suited to the prospective use."

The Board accepts that the MDP's CFO exclusion zone is clearly outlined, and that it includes the CFO east site that is proposed for expansion. In any event, the conclusion that the application is inconsistent with the County's MDP is uncontested.

Given that an IDP between Coalhurst and the County exists, but was not considered by the approval officer, the Board finds it necessary to look to that document for further clarification of relevant land use provisions.

3.3 Is the Application Consistent with the IDP between the County of Lethbridge and the Town of Coalhurst?

The following sections of the IDP address the development of new and existing CFOs in the "Intermunicipal Development Plan Confined Feeding Exclusion Area" (or Plan area), where the CFO west site is located:

> Livestock Operations (Confined Feeding Operations and Minor Livestock):

4.1.5 New confined feeding operations (CFOs) are not permitted to be established within the Intermunicipal Development Plan Confined Feeding Exclusion Area as illustrated on Map 11. Any existing CFO permit holders may be allowed to expand operations within the designated CFO Exclusion Area if it is to upgrade and modernize (within the requirements of the Agricultural Operation Practices Act and Regulations), demonstrating changes will reduce negative impacts (e.g. odours) to the rural and urban residents of the area, additional environmental protection will be considered, and comments from both the County and Town are received and considered by the NRCB.

4.1.8 Both councils recognize and acknowledge that existing confined feeding operations located within the Plan area will be allowed to continue to operate under acceptable operating practices and within the requirements of the Agricultural Operation Practices Act and Regulations.

The Board notes that while it is uncontested that application LA21033 is inconsistent with the land use provisions of the MDP, it is unclear to the Board whether the application is inconsistent with the relevant land use provisions of the IDP.

Views of Field Services

The Lethbridge County-Town of Coalhurst IDP (enacted in 2014 and prior to the most recent revisions of the MDP) was not specifically cross-referenced in the MDP and therefore, as per the guidance of NRCB Approval Policy section 8.2.3, the approval officer did not consider the land use provisions in the IDP.

Under AOPA, approval officers are instructed to disregard any land use provisions respecting "tests or conditions related to the construction of or the site for a confined feeding operation…." The Board heard from Field Services that section 4.1.5 of the IDP may be interpreted as a 'test or condition'. While Field Services made the reference outside of a permit decision (at the hearing), the Board respectfully disagrees with this interpretation. In this case, section 4.1.5 of the IDP allows for the expansion of a CFO if it is being modernized and will result in a reduction of nuisance impacts. This is not a direct replacement for AOPA standards or regulations; it is clearly a recognition that newer modern facilities are more likely than not to reduce nuisance impacts, and therefore may meet the planning objectives of the IDP. The Board recognizes that the analysis and discretion required by an approval officer to determine consistency with section 4.1.5 is challenging. However, in the Board's view, to disregard section 4.1.5 because it is a 'test or condition' is an overly simplistic interpretation in evaluating the spirit and intent of section 4.1.5 in the IDP.

Views of Double H Feeders

The applicant's RFR identified that "Double H Feeders Ltd. currently operates two broiler operations in the immediate vicinity of the Town of Coalhurst". The first site was described as "aging, and becoming obsolete and inefficient" and is located on NW 22-09-22 W4M "in an area designated 'Potential Grouped Country Residential' within the current Lethbridge County-Town

of Coalhurst IDP originally enacted in 2014". It is proposed by the applicant to be decommissioned. The second site is on NE 22-09-22 W4M, the location where Double H Feeders is "proposing to consolidate [its] production", "in an area designated 'Primarily Agricultural' within the same IDP", and would "enable [Double H Feeders] to continue production with barns built to accommodate modern practices and standards of efficiency."

The RFR includes a letter written by the applicant to the Town of Coalhurst with a submission date of March 31, 2021, that requests the Town's support. Within this letter, the applicant notes that the site on NE 22-09-22 W4M proposed for expansion "is located on Twp Rd 9-4 close to Hwy 25", and is farther from the Town than the site on NW 22-09-22 W4M, which is accessed via "Rge Rd 22-3, [a road that] has increasingly been used as an alternative access road to Coalhurst and is not ideal for truck traffic". The letter asserts that production "consolidated to a single site" would "[move] the barns further away from Coalhurst, and [remove] the associated truck traffic from Rge Rd 22-2".

During the hearing, Mr. Van't Land confirmed assertions made within his RFR and provided several examples of how the new proposed barns incorporate modern technology and have the potential to reduce nuisance impacts generated from the barns themselves.

Views of the County of Lethbridge and the Town of Coalhurst

The Board notes that both municipalities defer to the IDP's specific land use provisions for Planning Area 2, rather than the MDP's more general CFO exclusion zone identified in the Urban Fringe land use district. The IDP was negotiated between the two municipalities, among other reasons, for the purposes of promoting an "orderly and efficient development pattern within the Plan area that balances the long-range interests of the County and Town." [IDP p.5]. Both CFOs fall within Planning Area 2, with the west site located within sub-planning Area G which has been "identified for the future development of additional country residential uses". This was described as a "land use strategy decision . . . based on the current fragmentation of the lands and the existence of country residential uses in the immediate area". The IDP policies 3.4.5 and 3.4.6 identify the proposed location for expansion (east site) as suited for "agricultural uses", consistent with the "unfragmented, full quarter sections of land located on the periphery" of the plan area.

With respect to the two sites, "the County views the area as a whole" and the "the Town has historically viewed the two barn locations as one entire operation . . . under the control and direction of one landowner".

Within their submissions, the municipalities assessed the expansion of the east site relative to the policy objectives of the IDP (summarized below), and noted their support was contingent on the decommissioning of the current barn on the west site:

- *The Town acknowledges the existence of existing operations within the CFO exclusion area and agreed through the adoption of the IDP that expansions of CFO operations could be supported if the purpose was to upgrade to more modern operating premises and processes.*

- *The long-term development concept promotes the development of residential uses in the location of the existing barn and the discontinuation of a use that is not compatible with additional residential development supports the long term development strategy of both the Town and the County. The existing facility, which is in close proximity to the Town Boundary would be relocated further away from the corporate limits*
- *The IDP policy states that an expansion may be considered if it is to upgrade and modernize, demonstrating changes that will reduce the negative impacts to rural and urban residents of the area. By closing the older, less efficient operation in the NW 22-9-22-W4 and consolidating that operation to the NE22-9-22-W4 they are in the County's opinion reducing the negative impacts of the operation in the NW 22-9-22W4 on the town and adjacent residential acreages. The consolidation of the operation to the NE quarter allows them to modernize and improve their operations while still meeting the MDS requirements and improving a less than desirable situation next to the Town of Coalhurst. Both the Town of Coalhurst and Lethbridge County who are the parties of the IDP, are in agreement and supportive of the consolidation of the operation to the NE22-9-22-W4.*
- *Consideration was given to the proposed location of the new barn, which was east of the Town, and it was determined that the new location would be less likely to impact urban residences with any noise, odour or dust impacts that might be emitted from the operation as the location is down-wind of the prevailing west and north winds.*
- *The "Primarily Agricultural Land Use" area is regulated by the County's agricultural policies contained with the MDP and Land Use Bylaw and other policies of the IDP (See policy 3.4.5 of the IDP). Unlike some other areas of the IDP with the Town of Coalhurst, the NE 22-9-22-W4 is not identified for future town growth or country residential development.*

The County commented that "the current Lethbridge County MDP came into effect with the exclusion zones in 2010, and the IDP with the Town of Coalhurst and the applicable CFO policies and exclusion zone affecting the subject land was adopted later in 2014. A planned 2022 MDP revision will bring both statutory plans into conformity."

Views of the Board

The Board recognizes that municipal land use planning is a process established through the *Municipal Government Act*, and includes the public input of its constituents to establish a long term vision for a municipality. Nonetheless, a key intent of AOPA is to establish common rules across the province for the siting of confined feeding operations. The Board's assessment of whether to approve an application despite its inconsistency with an MDP is one undertaken with caution. It is with this consideration in mind that the Board assessed both the land use provisions of the MDP and IDP, and the related evidence provided by parties in their written submissions and at the hearing.

In examining the IDP between the Town of Coalhurst and Lethbridge County, the Board first notes Part 4 "General Land Use Policies", 4.1 "Agricultural Practices" – "Intent" states:

> "The County and Town both recognize that it is the jurisdiction of the Natural Resources Conservation Board (NRCB) to grant approvals and regulate confined feeding operations (CFOs). However, both municipalities agree it is desirable to specifically regulate intensive agricultural

> operations for the defined Plan area in an attempt to minimize potential nuisance and conflict between land uses, especially residential, and CFOs within the Intermunicipal Development Plan boundary."

Consistent with the evidence provided by the municipalities, the Board observes that the IDP does address existing confined feeding areas located within the IDP Confined Feeding Exclusion Area (or Plan area), and that existing CFOs "will be allowed to continue to operate", and "may be allowed to expand operations within the designated CFO Exclusion Area if it is to upgrade and modernize . . ."The Board observes that the municipalities were consistent in their support for expansion of the Double H Feeders east site if it is to "upgrade and modernize", and if Double H commits to decommission the west site. Further, the Board accepts that the test to satisfy this requirement is found in the language of the IDP section 4.1.5, which includes that a CFO "[demonstrates] changes [that] will reduce negative impacts (e.g., odours) to the rural and urban residents of the area", and that "additional environmental protection will be considered".

Mr. Van't Land described how he believed the consolidation of the two CFOs at the east site would upgrade and modernize the operations and reduce negative impacts to the rural and urban residents, explaining that the primary consideration of Double H Feeders to achieve modernization would be to "[take] the existing double-decker barns and [rebuild] them as a more appropriate model that is used primarily in broiler production today".

> "The primary concern we have there is the proximity to the town of Coalhurst and the number of neighbours that we have in close proximity to those barns… [The east site] is a whole quarter [of land] surrounded by more or less whole quarters [of land], and that's a more appropriate place for that kind of development [Hearing Transcript p. 210-211] …. It seems to suit the intent as we see it of the IDP, as far as future development, that the broiler operation [currently on the West Site] be moved further away from the town of Coalhurst [Hearing Transcript p. 215]."

The Board finds that the municipalities' views are consistent with these assertions, stating that the IDP policies 3.4.5 and 3.4.6 identify the proposed location for expansion (east site) as suited for "agricultural uses", given the "unfragmented, full quarter sections of land located on the periphery" of the plan area. As well, the intent of Double H Feeders to decommission the west site and expand the east site is consistent with the municipalities' stated "long-term development concept [that] promotes the development of residential uses in the location of the existing barn and the discontinuation of a use that is not compatible with additional residential development." Further, the County confirmed that the development of the east site which is designated as "Primarily Agriculture" would not conflict with the highway commercial and light industrial node slated for the area adjacent and northeast of the east site CFO [Hearing Transcript, p. 160].

This is further supported by the municipalities' assertions that "the proposed location of the new barn . . . would be less likely to impact urban residences with any noise, odour or dust that might be emitted from the operation as the location is down-wind of the prevailing west and north winds".

With respect to reducing the net nuisance impacts through the consolidation of the barns, Mr. Van't Land described that in addition to the new more modern barn, the fans, vents, lighting, and the computer systems that operate them, will be new. He also identified that his "authorization" from the Alberta Chicken Producers requires him to participate in annual ammonia level audits, including monitoring the ammonia levels in the barn:

> "… one of the goals of the ventilation system is to keep that ammonia down to a healthy level for both the birds and the people that are in the barns. So I just wanted to say that that is something that we monitor and keep down deliberately. It's mostly for the health of the birds, but the side effect of that is there is not large amounts of ammonia coming out of the barn" [Hearing Transcript p. 198].

Directly affected party Ms. Schmid asked for clarification regarding the ammonia levels escaping the barn, expressing concerns that increasing ventilation to move air out of the barn could increase ammonia going "into the environment". Mr. Van't Land asserted that ammonia control is achieved by "managing the moisture level", and that the "interaction of the moisture and the manure and the microbes . . . generates the ammonia". He further described that by lowering the density of ammonia in the barn, the air ventilated to the outside would have a lower concentration of ammonia as well.

As described in section 4 "Directly Affected Party Concerns" of this document, the Board appreciates the concerns expressed by the directly affected parties that may experience nuisance impacts. However, AOPA's consideration of impacts is met through the application of required setbacks, as established by minimum separation requirements. As well, the Board accepts the operator's request for neighbours to "let [him] know" if they have concerns and that "if there's something that [Double H Feeders] can do to mitigate [the concern] . . . [it] will definitely do it" [Hearing Transcript p. 216]. As well, the Board accepts the County's assertion that it views the area "as a whole", and further, meets the Board's understanding that if net impacts between the two operations are reduced, the intent of the land use planning objectives have been met:

> "… an Intermunicipal Development Plan is not just the county, it is an agreement between the town and the county, we look at what's existing in the area, what are some possible best outcomes in terms of future development and planning. And so with regards to impacts, we're looking at, especially with confined feeding operations, does an existing operation if they want to expand, would it meet the minimum distance separation, which I do believe Mr. Van't Land's application does for the expansion. And then with the decommissioning, it was seen as a net benefit to the Coalhurst area given the country residential and the proximity to the town, and the fact that they would not be necessarily drastically increasing their feedlot numbers but they would have a marked improvement in terms of their – the modernization of the facility from their northwest operation to their northeast. [Hearing Transcript p. 152]"

The Board further agrees with the municipalities' assertions in their written submissions that consolidating the operations to the east site and "closing the older, less efficient operation" moves the impacts from the area slated for country residential development to an area "that is not identified for future town growth or country residential development". The Board also notes that with a denial of an expansion, there is no requirement for Double H Feeders to

abandon the west site, which would maintain the operation of older, outdated CFO facilities on land zoned for country residential.

Given that the land use provisions in the IDP are specific to expansion in the CFO exclusion zone, the Board concludes that the IDP is relevant in its determination. In reaching this conclusion the Board views the Double H Feeders application as generally consistent with IDP section 4.1.5. The Board finds that the net nuisance impacts are likely to be reduced through the decommissioning of the west barn and the expansion of the east barn. The Board notes that the net increased production is 14%; however, the Board finds that it is more likely than not that the reduced net impacts will offset the increased production. While section 4.1.5 leaves room for interpretation and judgement, the Board concludes that the abandonment of the west site in conjunction with the expansion at the east site using current technology, and Board imposed conditions, meets the planning objectives of the IDP. At a minimum, the Board finds that the Double H Feeders application meets the spirit of IDP section 4.1.5, and does not conflict with its overall planning objectives.

4. DIRECTLY AFFECTED PARTY (DAP) CONCERNS

The Board appreciates the thought, time, and effort that directly affected parties invested in their submissions about this application. The comments, hearing submissions, and hearing participation have been very helpful to the Board's understanding of potential effects on the local environment, economy, community and the appropriate use of land. The Board afforded significant deference to DAP concerns that were unrelated to the question of the application's consistency with the MDP or IDP. Deference was given since some DAP concerns could be associated with whether the proposed CFO met the modernization and nuisance mitigation objective in the IDP. Also, the approval officer did not consider DAP concerns, asserting in the decision summary "Because this application will be denied, I need not discuss these concerns any further."

What follows is a summary of the written and oral discussions and views of the Board for each.

4.1 Change to Surface Water Flow

Directly affected neighbours explained that within the past few years a drainage system has been constructed by Double H Feeders at the east site. They believe that the system could cause additional surface runoff and potential flooding of their properties.

In Decision Summary LA21033, the approval officer determined that construction of a surface water drainage system such as this is under Alberta Environment and Parks' (AEP) jurisdiction, and forwarded this concern to AEP for its information. AEP verified that an approval under the *Water Act* was not issued to authorize this activity and is currently under investigation.

Views of the Board

The Board agrees with the approval officer's determination that AEP is the appropriate authority to address this concern and recognizes that it is being managed by AEP through its ongoing compliance investigation. Therefore, the Board will not address this matter further.

4.2 Nutrient Management, Manure Application, and Contaminated Surface Water Runoff

Neighbours questioned whether Double H Feeders has access to enough land for manure application from the proposed expansion. In the Decision Summary, the approval officer commented that the expanded operation would meet AOPA's nutrient management requirements regarding land application of manure with the nutrient management plan provided. The Board notes that the nutrient management plan was verified by a certified crop advisor and is satisfied that this concern has been adequately considered by the approval officer.

Neighbours expressed concern about prolonged odours and contaminated surface runoff from manure, poultry medication residues, and barn cleaning agents. Further, manure is field applied and not incorporated.

Double H Feeders explained that it direct seeds its crops, therefore manure is not worked into the soil after it is field applied, which it believes meets AOPA requirements. It also described that animal based medications are used infrequently, and that barns are cleaned primarily by mechanical means including compressed air, thus the amount of cleaning water is minimal and mostly evaporates from the barn surfaces.

In Appendix C, point 2, of the Decision Summary, the approval officer discussed conditions to be potentially carried forward from Municipal Development Permit 98-189 if the Board decides to grant a permit for this proposal. The second condition of Permit 98-189 focuses on items which are pertinent to the topic of nutrient management and manure application. It consists of several parts:

- the amount of land that must be available for manure utilization,
- manure application on snow and/or frozen ground,
- manure incorporation with 48 hours of land spreading, and
- consideration for neighbouring residences and separation from residences for manure spreading.

The approval officer stated:

- The specific land base required for manure utilization in Permit 98-189 is redundant and should be replaced by AOPA and its regulations or a nutrient management plan.

- Regarding the requirement to not spread manure on snow and/or frozen ground, the approval officer commented that this too is redundant and should be replaced by the updated requirements of AOPA and its regulations.

Views of the Board

The Board is in agreement that land base requirements in Permit 98-189 are redundant, especially as this permit application is for an increase in the number of birds at the site, which will change the volume of manure and nutrients to be managed. The Board is also in agreement that AOPA's regulations make specific references to manure spreading on frozen ground redundant.

The approval officer suggested that the requirement in Permit 98-189 to incorporate manure within 48 hours of land spreading should be carried forward because it is more stringent than AOPA, which allows application of manure on directly seeded crops without incorporation. Double H Feeders stated it was unaware this condition was still in effect as it believes AOPA's present-day requirements are what it must follow. Double H Feeders asked the Board to consider rescinding this condition as it does not fit its current cropping practices. Neighbours asked the Board to retain the permit condition to alleviate their concerns about manure contaminated runoff and prolonged odours from manure application.

Double H Feeders did not include a request to amend its permit to remove the 48 hour manure incorporation condition in its application to expand the east site. Permit amendment applications allow directly affected parties to provide their comments about proposed amendments after receiving advance notice and prior to an approval officer issuing their

decision. No such notice on a permit amendment was given by Double H Feeders; as such the Board will not rule on the matter. Should Double H Feeders wish to continue its current practice of manure spreading on direct seeded land without incorporation, it must apply for and receive a permit amendment.

4.3 Odours, Health Concerns, and Quality of Life

Directly affected neighbours stated that there are occasions when odours from the existing poultry broiler operation at the east site, as well as from other nearby CFOs, affects their quality of life. Concerns were expressed about impacts on the health of the surrounding community due to the odours, and information was requested about CFO air quality monitoring requirements.

Double H Feeders commented it was not aware that neighbours had concerns about odours from their operation as no one has directly complained to it, nor has it been notified by the NRCB that a complaint had been lodged. It requested that neighbours let it know when odours are bothersome and it will endeavour to address the situation.

Views of the Board

AOPA does not mention or require air quality monitoring for CFOs. Instead, it employs a prescriptive regulatory framework, using tools such as minimum distance separation (MDS), in order to achieve a consistent, province-wide approach for siting CFOs. For the Double H Feeders' proposed expansion, the approval officer determined that it meets the required setbacks from all nearby residences. The Board understands that people residing beyond the MDS may intermittently experience odour impacts from the CFO, and that each individual has their own degree of tolerance for certain odours. Therefore, the Board also considers whether the potential impacts are typical of land uses for the area. During the hearing, both Lethbridge County and the Town of Coalhurst indicated that the location of the proposed expansion, on land designated as "primarily agricultural", is an appropriate use of land and meets their planning objectives.

For the above reasons, the Board has determined that odours from the proposed poultry broiler expansion should not unduly impact the health of the surrounding community or neighbours' quality of life. The Board appreciates that Double H Feeders is willing to work with neighbours to try to mitigate odour impacts. Additionally, neighbours can contact the NRCB 24 hour reporting line at 1-866-383-6722 when they believe that odours from the CFO are inappropriate for an agricultural area, and an NRCB inspector will follow up on the concern.

4.4 Impact on DAP Land Values

Directly affected neighbours stated that the proposed CFO expansion may reduce property values of the surrounding area.

Views of the Board

The Board has consistently stated that impact on property values is an issue that resides outside of AOPA legislation.

4.5 General Environmental Concerns and Environmental Impact Assessment (EIA)

Written submissions from neighbours included some general statements of concern relating to environmental impacts on the eco-system from CFOs.

Several references were made by one of the directly affected neighbours about an EIA, including a request from the party that they "would like disclosure from the NRCB regarding the Environmental Impact Assessment [that] outlines the long term impacts on air, water, land, and biodiversity".

Views of the Board

AOPA's Standards and Administration Regulation contains construction and operational requirements for livestock facilities that are intended to protect the environment. Before issuing permits, NRCB approval officers must ensure that all applicable requirements are met. NRCB inspectors verify that operators adhere to legislative requirements and permit conditions. If necessary, inspectors can initiate enforcement action in accordance with the NRCB Compliance and Enforcement Policy.

There are a number of EIA references in the *Natural Resources Conservation Board Act* and the Rules of Practice of the Natural Resources Conservation Board Regulation; however, those references all relate to the reviewable projects as identified in the *Natural Resources Conservation Board Act*. The Board has a distinct mandate under the AOPA legislative provisions, which is the relevant mandate to the Double H Feeders application. While AOPA does not require an EIA, the regulations effectively manage environmental risks and nuisance impacts that would be duplicative in an EIA.

5. CONSIDERATION OF PERMIT CONDITIONS

In addition to Board direction regarding permit conditions in the preceding section, the Board requires as conditions of approval the following:

1. In Decision Summary LA21033, Appendix C, the approval officer suggested potential new conditions and permit conditions that should be carried over from previous permits should the Board overturn the denial. The Board directs that the conditions outlined in Decision Summary LA21033, Appendix C, be included in the approval.

2. During the hearing, Double H Feeders stated that moving its operations from NW 22-09-22 W4M to NE 22-09-22 W4M would require a maximum time period of 5 weeks. During this time period, chicken broilers would be at both locations simultaneously. The Board directs that at no time shall the total number of chicken broilers between the two operations (NW 22-09-22 W4M and NE 22-09-22 W4M) exceed a population of 120,000.

3. Approval of the expansion at NE 22-09-22 W4M is contingent on the abandonment and return of the previous Municipal Development Permit 93-164 at NW 22-09-22 W4M. Double H Feeders consented to cancelling the permit associated with NW 22-09-22 should the application for expansion at NE 22-09-22 W4 be approved. Therefore, once the NW 22-09-22 W4M operation is fully depopulated, the CFO permit for NW 22-09-22 W4M is cancelled.

4. The County and the Town agreed that short term manure storage of solid manure on NW 22-09-22 W4M would be acceptable. While the Board is prepared to allow a degree of short term storage on NW 22 09-22 W4M, we believe that it should be more restrictive than the AOPA regulations. As such, the Board directs the approval officer to include a condition that short term storage of solid manure on NW 22-09-22 W4M (sourced only from NE 22-09-22 W4M) is allowed for a maximum cumulative time of 7 months over a 3 year period, regardless of the storage location on NW 22-09-22 W4M.

5. The Board recognizes that Double H Feeders may apply for a permit amendment to remove the existing (municipal permit imposed) 48 hour manure incorporation condition. Regardless, due to the proximity of NW 22-09-22 W4M to the Town, the Board requires that manure spread on this quarter be incorporated within 48 hours and it expects that this condition be upheld.

6. BOARD DECISION

For the reasons set out above, the Board hereby directs the approval officer to issue an approval (including Board imposed conditions) to Double H Feeders Ltd. to construct and operate a confined feeding operation as described in application LA21033.

DATED at EDMONTON, ALBERTA, this 17th day of March, 2022.

Original signed by:

_____	_____
Peter Woloshyn, Chair	Sandi Roberts
_____	_____
L. Page Stuart	Earl Graham

NRCB | Natural Resources Conservation Board

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APPROVALS

Operational Policy 2016-7

Agricultural Operation Practices Act
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Notwithstanding this omission, the NRCB believes that AOPA intended to allow organizations to qualify as directly affected parties for registration applications, *if* the organizations meet the criteria that apply to other parties.

6.7.3 Authorization applications

Under section 21, only applicants and municipalities qualify as directly affected parties for authorization applications.

6.7.4 Organizations' participation as non-directly affected parties

An organization that is not a directly affected party may act as an agent for a directly affected party with respect to an AOPA permit application. The organization must provide clear evidence that the party has appointed the organization to be its agent for this purpose.

If an organization has not been appointed as an agent for a directly affected party, approval officers will still consider a submission from an organization with respect to a permit application, if the submission raises issues that are relevant to the application, and if the organization's submission is:

- included in or attached to a written submission from a directly affected party, or
- separately filed but cross-referenced in the directly affected party's submission.

7. Permitting procedures

AOPA and its regulations prescribe several procedures for approval officers to follow when they review permit applications. This part of the approval policy sets out several additional procedural policies that the NRCB has adopted, consistent with AOPA's purpose and the principles listed in parts 1 and 2 above.

7.1 Two-part application process, establishing MDS and extensions

AOPA refers to filing a single "application" for a given permit. However, the AOPA Administrative Procedures Regulation (s. 3) requires applications for approvals and registrations to be submitted in two parts, and allows applicants to submit Part 2 of the application within six months after submitting Part 1. Section 3 of the regulation gives approval officers discretion to decide the format and required content of an authorization application. For consistency with the application format for approvals and registrations, approval officers will generally also require a two-part application for authorizations.

Under the AOPA Administrative Procedures Regulation (s. 2(2)), the Part 1 form (for approvals and registrations) requires the applicant's name and contact information, the numbers, category, and type of livestock that will be housed at the CFO, and the legal description of the land where the CFO is located. The Part 2 forms require more comprehensive and technical information, including site and design plans, and all the information needed by the approval officer to assess whether AOPA's specific, technical requirements have been met.

The act and the AOPA Administrative Procedures Regulation also give approval officers discretion to require applicants to provide more information than that required by the part 1 and 2 forms.

The purpose of having a two-part application process is related to section 3(2) of the Standards and Administration Regulation, which states that the minimum distance separation (MDS) "must be calculated … as of the date the application is received" by the approval officer. In other words, applicants must meet the MDS to those neighbouring residences that exist or have a development permit as of that application filing date.

Using a two-part application allows the date for applying the MDS requirements in section 3 of the Standards and Administration Regulation to be set as soon as the applicant submits their Part 1 application. However, the Part 1 application form states that an approval officer may deny an application if an applicant fails to submit their Part 2 application within six months after filing their Part 1 application.

If the applicant wishes to increase the permitted number of livestock after submitting a Part 1 application, they must submit a new Part 1 application that states the revised livestock numbers. The application's ability to meet the MDS requirement will be determined on the date the revised Part 1 application is received.

If the applicant wishes to decrease the permitted number of livestock after submitting a Part 1 application, the submitted Part 1 must be amended. The date the Part 1 was originally received will stand and be used as the date on which the application's ability to meet the MDS requirement is determined.

This overall approach is a reasonable balance of the interests of CFO applicants and neighbours. On the one hand, it gives applicants certainty with respect to whether they can meet the MDS requirement, before they commit the considerable time and resources needed to finish all of the engineering work and obtain the other technical information that is needed to complete their entire application. On the other hand, the six month deadline for submitting the Part 2 application ensures that an applicant cannot, simply by filing a Part 1 application, try to discourage neighbouring landowners from developing residences on their own properties.

In fact, if the NRCB applied the MDS requirements only as of the date the full application form was submitted (but not necessarily when the application was "deemed complete"), this approach might encourage applicants to skimp on the information provided with their application form in order to file their applications as soon as possible so they could "lock in" the earliest possible MDS calculation date. The end result would be somewhat like the two-step application process that the NRCB uses, because applicants would likely need to supplement their original applications.

If an applicant cannot meet the six month deadline for filing the Part 2 application, they may submit a written request to the approval officer, with reasons, to extend the deadline for up to six more months—i.e., for a maximum of one year after the Part 1 was filed. (See section 2(5) of the AOPA Administrative Procedures Regulation, for approval and registration applications.) The approval officer will consider the extension request and advise the applicant of their decision, in writing. If an extension is granted, the approval officer must provide a copy of this decision to the municipality in which the proposed development is located.

7.1.1 Applicant requests to delay processing a completed permit application

Applicants occasionally ask approval officers to delay processing their permit application even after the approval officer has deemed their application complete. Sometimes this request is made because the municipality is in the

process of revising its municipal development plan and the expected changes will be favorable to the applicant. Another example is when the applicant needs to consider changing their proposed facility design due to changed construction cost estimates.

As noted in part 7.1 above, approval officers generally give applicants six months to file their part 2 application after filing their part 1. In addition, under section 6(4) of the AOPA Administrative Procedures Regulation, applicants have six months to provide any supplemental information requested by an approval officer. However, neither AOPA nor the regulations state when approval officers must make a final decision on a completed application. Approval officers generally try to make their decisions as soon as practicable, in part, to facilitate the applicant's business planning, and also given that the initial Part 1 application locks in the MDS date.

Approval officers have broad discretion for scheduling their decision process. This discretion includes deciding whether to delay a decision at an applicant's request. In some instances, approval officers can accommodate a delay request without changing their own decision schedule.

In other instances, applicants may request a delay well past the approval officer's planned decision date. In these instances, an approval officer will not grant a delay of more than six months past the approval officer's planned permit decision date. Approval officers will consider delay requests (up to six months) on a case-by-case basis, by assessing whether the applicant has provided a reasonable justification for the requested delay and whether the requested delay would be fair to the applicant and all other parties.

To make these assessments, approval officers will consider all relevant factors, including:

- how long a delay the applicant is requesting
- if the delay request is premised on the future occurrence of an independent event, how likely that event is to occur (e.g. the municipal council's revision of its MDP)
- the length of the application process, and causes for any delays in that process, up until the date the applicant made their request for delay. If an approval officer grants an applicant's request for a delay of one month or longer, the approval officer will provide notice of the delay to the municipality and to all parties that submitted statements of concern.

7.2 Amending an existing permit or issuing a new permit

AOPA and the Part 2 Matters Regulation provide for permit amendments, and for the issuance of new permits, for various proposed changes to existing CFOs. However, the act and the regulation are not clear as to which of these two approaches—amending a permit or issuing a new one—should be used in various circumstances. The NRCB has adopted the following general rules:

- If an operator wishes to change a condition in an existing permit or modify a permitted CFO facility, with no increase in livestock numbers, the operator must apply for an amendment to the existing permit.

In the second and fourth alternatives, the declaration also acknowledges that

- if the NRCB issues an AOPA permit, neither that permit, nor any construction or addition of livestock under that permit, will enhance or be relevant to the applicant's eligibility for a water licence.
- any construction or livestock populating under an AOPA permit will be at the operator's own risk if a water licence is denied or if the operation is otherwise deemed to be in violation of the *Water Act*.

In addition, the applicant must indicate if their confined feeding operation is located in the South Saskatchewan River Basin and acknowledge that the basin is currently closed to new surface water allocations.

8. Permitting criteria and choosing or amending permit conditions

AOPA sets out technical requirements and other permitting criteria. Parts 8.1 to 8.8 of this policy, below, address approval officer discretion in applying the legislative criteria, and clarify ambiguities in the criteria. Approval officers conduct and document a technical review of applications to determine whether the application meets the requirements of AOPA and its regulations.

8.1 Burdens and standard of proof

Applicants for AOPA permits generally have the burden or onus of demonstrating that the application meets the requirements of AOPA for the permit they have applied for. Similarly, permit applicants who request a variance under section 17(1) of AOPA have the onus of demonstrating why a variance should be granted.

Parties that oppose a permit application (or that request additional conditions to be attached to a permit) have the burden of proving all assertions that they make to support their position.

For all burdens of proof, the *standard* of proof is the balance of probabilities ("more likely than not").

Approval officers will apply all burdens of proof fairly, flexibly and pragmatically.

8.2 Determining consistency with municipal development plans

Sections 20(1), 22(1) and 22(2) of AOPA require an approval officer to assess whether an application for an approval, registration or authorization is consistent with the "land use provisions" of the local municipal development plan (MDP) and to deny any application that is inconsistent with those MDP provisions.

8.2.1 Independent MDP consistency determinations

The NRCB values and has regard for input from the municipality and other parties. An approval officer will provide notice to the local municipality and request its input regarding the application's consistency with the municipality's MDP. An approval officer also has discretion to request additional clarification or other input from the municipality regarding its MDP provisions.

While approval officers solicit the input of municipalities, under AOPA approval officers ultimately must interpret MDPs and make the MDP consistency determinations required by the act. Thus, approval officers will have close

regard for municipal input but are not bound to follow a municipality's views regarding the meaning and application of its MDP, or the case by case opinion of its municipal council.

8.2.2 New and amended municipal development plans

In making MDP consistency determinations, approval officers will use the MDP in effect on the date they issue their permitting decision, even if it is not the same version of the MDP that was in effect when the Part 1 application was received.

8.2.3 Relevance of statutory plans and land use bylaws to MDP consistency determinations

Approval officers will consider land use provisions in:

- other planning documents that are "statutory plans" under the *Municipal Government Act*, if the municipal development plan cross-references those other planning documents.
- a municipality's land use bylaw, if the text of the municipal development plan provides a clear intent to adopt a land use bylaw provision by referring to it as a land use provision. See *Folsom Dairy Ltd.*, NRCB Board Decision 2015-01, pp. 5-6.

If a municipality is too small to require a municipal development plan under the *Municipal Government Act*, and the municipality has not adopted an MDP, the approval officer will consider the municipality's land use bylaw and any other relevant planning document.

8.2.4 Interpreting municipal development plan terminology

Some municipal development plans set out land use restrictions that the municipality "requests" or "encourages" the NRCB to apply when considering AOPA permit requests. Other municipal development plans state the development circumstances that the municipality will or will not "support," when providing input to the NRCB on an AOPA permit application. Unless the plan clearly states that the provision is intended to be discretionary, approval officers will interpret these types of provisions as mandatory land use restrictions.

Unless specifically noted, terms such as "expansion" in municipal development plans will be interpreted to be consistent with the meaning under AOPA.

8.2.5 Municipal development plan "land use provisions"

As noted above, the MDP consistency determination relates only to MDP "land use provisions." AOPA does not define this term. Nor is it defined in the *Municipal Government Act*, which is the statute by which MDPs are adopted.

The NRCB considers MDP provisions that require certain procedures, such as a meeting with the local community, as outside the scope of MDP "land use provisions."

The NRCB also interprets "land use provisions" as referring to land use rules that do not require substantial discretionary, or subjective, evaluations of the merits of individual proposed developments.

NRCB Natural Resources Conservation Board

Agricultural Operation Practices Act

Board Decision 04-05

Erik Meinders and Meinders Farm
NRCB Application FA02001

Review Hearing
Grande Prairie, Alberta
May 31, June 1, 2, 3, 4, 29 & 30, 2004

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1. INTRODUCTION

On April 19, 2002, Erik Meinders and Meinders Farm filed an application with the Natural Resources Conservation Board (NRCB or Board) for an Approval to construct and operate a 1200 sow farrow to wean facility, located at SW ¼ Section 3-73-7-W6 in the County of Grande Prairie No. 1 (County).

Mr. Vince Murray, an NRCB Approval Officer, denied the application in Decision Report FA02011 issued on January 16, 2004. Decision Report FA02011 stated that the proposed operation did not meet the requirements of the *Standards and Administration Regulation* passed pursuant to the *Agricultural Operation Practices Act* (*AOPA*) because it was not consistent with the Municipal Development Plan (MDP) of the County and the proposed compacted clay liner for the manure storage facility did not meet the requirements with respect to hydraulic conductivity.

Based on the deadlines established within *AOPA*, Decision Report FA02011 specified February 6, 2004 as the closing date for directly affected parties to submit a Request for Board Review of the Approval Officer's decision. Subsequently, the Board received Requests for Board Review from Erik Meinders and Meinders Farm; the County of Grande Prairie; Bear Lake Area Farmers and Residents (BLAFR); Gary Dixon; Mary Hanson; Douglas and Jean Thornton; Maureen Crerar; Mike and Florence Griko; Jim and Deb Polasek; Dennis and Alice Leggatt; Ed Bergen (Bear Lake Bible Camp); Randy Gorrie; Alec and Isabel Gorrie; Desmond Brown; and Jean Polasek.

On February 11, 2004, the Board met to consider the Requests for Board Review and decided that a review was warranted. A Division of the Board was established to determine whether the Approval Officer's decision should be confirmed, varied, amended, or rescinded. Dr. Gordon Atkins (Chair), Ms. Sheila Leggett, and Mr. Wayne Inkpen were designated as the Division of the Board for this review.

On March 15, 2004, the Board held a Pre-Hearing Meeting in Grande Prairie to address preliminary and procedural matters in order to streamline the hearing process. On March 30, 2004, the Board issued a *Pre-Hearing Meeting Report*, which identified the issues for review, submission deadlines, and the Board's decision respecting parties with standing to participate at the review.

The Board review took place in Grande Prairie over a period of seven hearing days: May 31, June 1, 2, 3, 4, 29 and 30, 2004. During the course of the review, the Board also conducted two site visits. This report briefly highlights the positions of the parties to the review and provides the Board's decision following the review of Application FA02011.

2. APPEARANCES

The following list identifies participants in the hearing:

Participant:	**Representative:**
NRCB Approvals & Technical support • Vince Murray • Jim Fujikawa	Bill Kennedy, Counsel
Erik Meinders and Meinders Farm • Erik Meinders, Applicant • Elston Solberg • Rob Saik • Ron Ackroyd • Pat Maloney • Tom Dance • Mike Harbour	Keith Wilson, Counsel
County of Grande Prairie No. 1 • Richard Harpe • John Simpson • Russell Bardak • Alan McCann • Ted Harrison • Cheryl Schindel • Dave Gourlay	Bill Barclay, Counsel
Bear Lake Area Farmers and Residents (BLAFR) and Bear Lake Canuck Historical Society • Garry Coy • Douglas and Jean Thornton • Phil and Maureen Crerar • Harry Rowney • Gary Dixon • Arnie Meyer • Florence Griko • Dennis and Alice Leggatt • Des Brown • Alec Gorrie **Bear Lake Bible Camp** • Walter McNaughton • Wendell Rice • Edward Bergen • Len Siebert	Darryl Carter, Counsel Jordan Crerar, Counsel
Wilf Tolway	Wilf Tolway

In addition, the Board was assisted by legal counsel: Kurt Stilwell (Counsel) and technical experts: Richard Stein (Senior Hydrogeologist), Ken Kelly (Municipal Planner), and David Chanasyk (Hydrologist). Additional staff support was provided by Rachel Stein (Review Officer) and Susan Schlemko (Manager, Board Reviews).

3. VIEWS OF THE PARTICIPATING PARTIES

Parties to the review provided a great deal of testimony and documentary evidence in support of their various positions. This portion of the Decision Report is meant to provide an overview of parties' positions with respect to the issues set for review; however, it does not purport to be inclusive of all of the testimony, opinions, and evidence advanced at the hearing.

Approval Officer and Technical Support

Mr. Vince Murray attended the hearing to advise of his considerations and steps taken in reaching his decision (Decision Report FA02011) to deny Mr. Meinders' application. Mr. Jim Fujikawa, NRCB Senior Soil Specialist, provided advice to the Approval Officer with respect to the application, and subsequently attended the hearing to explain the advice he provided in the technical review reports he prepared for the Approval Officer's consideration (Exhibit 6). Counsel for the Approval Officer further identified that the Approval Officer's participation at the review was limited in scope to the decision he reached which formed the basis for the review. The Approval Officer took no position with respect to an outcome of the Board review.

In Decision Report FA02011, the Approval Officer stated that he denied the application for two reasons. First, he determined the proposed facility was inconsistent with the Municipal Development Plan (MDP). Secondly, it did not meet the requirements of the regulations, in that the hydraulic conductivity of the proposed clay liner for the earthen manure storage did not provide the same or greater protection as required in the regulations.

In considering the application's consistency with the MDP, the Approval Officer submitted that he relied upon the County's advice with respect to its interpretation of the MDP. The Approval Officer advised his decision was based on the MDP amended February 20, 2001 ("old MDP"), rather than the current MDP amended January 5, 2004 ("amended MDP"). However, following a cursory review of the County's amended MDP, the Approval Officer agreed with the County's view that the application was inconsistent with this MDP.

With respect to the availability of water for the proposed facility, the Approval Officer advised that he relied on the advice of Alberta Environment (AENV) and believed that there would be an adequate water supply for the proposed operation. He stated that AENV had indicated it was prepared to issue a water license for the facility, having determined that the aquifer had sufficient capacity to support the current users and the proposed operation. To support this submission, he provided AENV's November 6, 2003 correspondence (Exhibit 7), which advised that it was prepared to issue the license if the application were approved and that:

> "…review of the technical report submitted in support of the application shows that the well is capable of producing the requested volume of water (12,775 cubic metres per

> annum) on a sustainable basis and it is anticipated that pumping this well will have very little to no impact on surrounding water well users or surface water bodies."

In response to concerns raised that there was a discrepancy regarding the water requirements identified in the application compared to the actual water license application filed with AENV (the water license application asked for less water than was identified in the *AOPA* application), the Approval Officer advised that he did not take issue with this discrepancy, as he believed that management practices could easily account for up to a 20% variance. He further noted that if the operation required more water than the volume allocated in a licence, the operator would need to apply to AENV for a licence for the additional volume.

One of the reasons the Approval Officer denied the application was because it did not demonstrate that the materials to be used for the earthen manure storage (EMS) facility were sufficient to meet the hydraulic conductivity requirements of Section 9 of the *Standards and Administration Regulation*. At the hearing, the Approval Officer advised that following his review of the supplemental EBA Engineering report (submitted after Decision Report FA02011 was issued), he believed the soils would be suitable to adequately meet *AOPA's* requirements for a compacted clay liner. He further agreed that had he received the supplemental EBA report prior to issuing his decision, this issue would not have been a reason for denying the application. The Approval Officer described his considerations in determining that there was a sufficient land base for spreading and incorporating manure, as required by the *Standards and Administration Regulation*. In Decision Report FA02011, he identified that a land base of 1400 acres was available for the facility, while 506 acres would meet the *AOPA* requirement. However, he identified two issues with respect to the land base: limitations of solonetzic soils and the distance between the facility and some of the available spreading lands.

In his decision report and at the review, the Approval Officer reported that soil limitations existed at the proposed site. He identified that requiring a manure management plan (MMP) as a condition would be appropriate, were an Approval to be granted, and that such a plan should include a detailed assessment of the lands to be used. The Approval Officer further identified that an MMP should include:

> "a detailed soil survey to identify the areas with solonetzic soil and the characteristics of those soils, proposed manure application rates, timing of manure application, setbacks from common bodies of water etc. in addition to the other records required in the regulations."

He also stated that an MMP should address runoff concerns and that the method of incorporation should minimize these concerns.

The Approval Officer advised that it was his interpretation that the standards in *AOPA* regarding requirements for manure spreading lands refer to a one time application for a three year period. He also submitted that the tables provided in *AOPA* are based on a one time application of manure on "average soils" with an "average crop". He identified that for the Meinder's application, this referred to an "average barley crop on an average grey wooded soil." He submitted his belief that the intent of the legislation was that after the first manure application, an operator would develop a nutrient management plan to address *AOPA*'s requirements. At the review, he indicated that although an MMP would be appropriate, he was not satisfied that the

identified lands would be sufficient to handle the manure produced by the facility after a full year of operation, and he was unable to quantify the sustainability of manure spreading on the proposed lands. He submitted that if an Approval were granted with conditions, the operation should not be populated until an MMP was submitted and approved. In his testimony, the Approval Officer advised that the Applicant had not yet provided sufficient information to constitute an MMP.

The Approval Officer also identified concerns with using the direct injection method for manure incorporation on the solonetzic lands, stating that if the ground was dry and hard, it would be difficult to successfully employ this method. In Decision Report FA02011, the Approval Officer determined:

> "Direct injection of the manure into the solonetzic soils may not be possible and proper incorporation may be difficult to achieve on the proposed solonetzic land base. If manure application does not occur under the right conditions, the manure and/or soil will be at risk during runoff. The method of application meets the requirements of the regulations but if the conditions are not suitable, manure application by direct injection or incorporation could result in a risk to the environment and a resulting enforcement action by the NRCB. If approved, the method of manure application will be included in the manure management plan provided to the NRCB."

The Approval Officer also expressed some concern with the distance between the proposed facility and some of the spreading lands. He suggested that an operator's costs would tend to increase in relation to the distance manure needs to be hauled, and this could be a deterrent for an operator utilizing the more distant spreading lands.

In his testimony, Mr. Jim Fujikawa provided an overview of the physical and chemical properties of the soils adjacent to the proposed facility and described how those properties could relate to manure application. He described that he had accessed the Agricultural Region of Alberta Soil Inventory Database (AGRASID) for information on soil classifications for the proposed manure spreading lands, and advised that the home quarters are all classified as either Rycroft of Kleskun. He reported that the presence of salts, particularly sodium, in these soils presented limitations to conventional agronomic practices. He also identified challenges with respect to incorporation and injection of manure and concerns regarding possible movement of excess salts or nutrients depending on manure application practices.

The NRCB's Senior Soil Specialist expanded on his advice to the Approval Officer as submitted in Exhibit 6. This Exhibit includes his June 20, 2002 letter to the Approval Officer and a report dated December 12, 2003: "*Technical Review of Nutrient Management Plan: Soils*". This report identified his findings following his review of the application and additional materials provided by consultants for both the Applicant (E. Solberg) and the BLAFR (G. Coy).

In his report, he discussed the physical and chemical properties of the Solonetzic soils that were identified for manure spreading, noting:

> "The specific properties of the Rycroft and, in particular, the Kleskun series of Solonetzic soils adversely affect agronomic practices and productivity."

He also stated:

> "these soils exhibit poor internal drainage and poor soil structure, especially when wet. Consequently, these soils also pose limitations to conventional agronomic practices followed in the land application of manure. Site-specific Solenetzic (sic) soil characteristics may necessitate restricting manure application rates and manure application frequency to ensure manure constituents, especially salts, neither accumulate in the receiving soils nor migrate off-site."

In recommendations to the Approval Officer he reported that, "Long-term swine manure application on saline-sodic affected Solonetzic soils such as the Kleskun series is not sustainable."

Notwithstanding concerns with respect to soil limitations and the distance between the proposed facility and some of the spreading lands, the Approval Officer determined in Decision Report FA02011 that there was a sufficient land base to meet the requirements of the regulations. He stated his belief that the issues regarding soil limitations could be addressed through adopting an MMP.

With respect to economic effects of the project, in Decision Report FA02011, the Approval Officer stated that the County was concerned the proposed operation would impact growth in the Clairmont area. He also stated that:

> "At the same time, the development of CFO's in Alberta has been and continues to generate economic growth. Detailed projections of the economic effects associated with this project can only be assessed in general terms."

He determined that since he found the application was inconsistent with the MDP and he would therefore be required to deny it, further assessment of the economic or community effects was not necessary.

At the review, the Approval Officer discussed his considerations with respect to odour impacts as identified in parties' Statements of Concern (particularly odours at Bear Lake). He identified that the minimum distance separation from the proposed facility was greater than required for all of the neighbouring residences. The Approval Officer identified that the odours could be expected to vary depending on activities taking place at the site (manure spreading, lagoon agitation, etc.) and dependent on other factors including the method of application, and wind and weather conditions. However, he stated his belief that the expected odours would be acceptable according to *AOPA*. In Decision Report FA02011, the Approval Officer also noted that "Manure application must be done in accordance with the *Standards and Administration Regulation* and may not cause an inappropriate disturbance." He also advised that the application proposed mitigative measures for odour production, such as including a cover for the liquid manure storage, using canola oil for dust control in the barn, and applying manure through direct injection.

In dealing with the traffic impact assessment, the Approval Officer identified that traffic concerns were raised and considered in processing the application. He advised that the traffic concerns were forwarded to the Applicant, who then provided a basic traffic impact assessment

which was also delivered to the County. With respect to expected traffic, the Approval Officer suggested that he expected travel impacts (types of vehicles and road usage) would be similar to that generally used for an average grain farm operation, except for during the construction phase of the project. He also advised that if an Approval were issued, he would expect the Applicant to deal directly with the County to reach a road use agreement.

Applicant (Erik Meinders / Meinders Farm)

On the issue of the appropriate MDP for the Board's consideration, the Applicant submitted that the Board should consider the MDP that was in place at the time the Approval Officer issued his decision report, namely MDP Bylaw 2360, amended January 5, 2004. The Applicant contended that the proposed project was consistent with this MDP in all respects, except that it did not meet the buffer requirement for the two mile radius around the Bear Lake municipal recreation area. The Applicant proposed that the Board should exercise its discretion under Section 25(4)(g) of *AOPA* to address this issue, noting that this section states that the Board must have regard for, but is not bound by, the MDP. The Applicant also advanced several arguments to support its position that the Board should approve the proposed project despite the restrictions imposed by the MDP.

The Applicant relied upon advice from Ms. Patricia Maloney, an expert planner, who reviewed the County's land use documents and submitted that the proposed facility was both appropriate for the area and compatible with the area's existing development.

The Applicant also suggested that the proposed project could be permitted as a discretionary use. Ms. Maloney (EBA Engineering Consultants Ltd.) submitted:

> "…the appropriate approach for the NRCB to take in this situation is to assess the proposed CFO in the same manner that a municipality would assess a discretionary use application. When faced with a discretionary use application, a municipality will assess the compatibility of the proposed project with the existing adjoining uses and the unique characteristics of the application. Compatibility is a function of impacts. If impacts are minimal, then there is compatibility. Conversely, if the impacts of the proposed use will be significantly adverse to the existing uses, then the proposed use is not compatible and would not receive a discretionary use approval. Another option for discretionary use is approval with conditions to mitigate the potential adverse impacts."

The Applicant advanced the view that the proposed operation's use of the lands for livestock production would be "…consistent with the general land use planning statements and vision principles set out in the MDP." In addition the Applicant believed that most of the inconsistencies between the proposed project and the MDP were related to the County's technical standards, and that the requirements of *AOPA* rather than the requirements of the MDP provided the overriding legislation that the operation was required to meet. The Applicant submitted that the MDP's technical standards were inconsistent with *AOPA's* regulations.

The Applicant argued that:

> "…the foundation of the County's MDP restrictions on CFOs are fundamentally flawed, arbitrary, and implemented for the improper purpose of stopping the Meinders' project."

The Applicant submitted that the amendments to the MDP imposed an excessive setback for the Bear Lake recreation area and that the County had not provided a "credible rationale" for what the Applicant considered to be "many extraordinary restrictions in its MDP." In summary, the Applicant suggested that the Board should carefully assess the proposed project in the context of the adjoining land uses and override the MDP pursuant to Section 25(4)(g) of *AOPA*.

With respect to water related concerns, the Applicant provided assurances that the proposed operation would only use the volume of water as applied for, and reported that the water consumption for the operation would be monitored by a flow meter, the results of which would be forwarded to AENV. Further, the Applicant reported that the site currently has one well and that there are no plans to drill additional wells at this time.

The Applicant retained EBA Engineering Consultants Ltd. to assist in establishing that an adequate water supply existed for the proposed operation. EBA reported its findings that the pump test results demonstrated that a suitable safe yield was available to satisfy the requirements for the proposed operation.

The Applicant further submitted that the regulation of water in Alberta rests with AENV under the *Water Act*. The Applicant expressed disappointment that AENV chose not to participate in the hearing process and suggested that despite the NRCB's review process, parties opposed to the project would not be precluded from appealing any decision issued by AENV, respecting the water license, through the Environmental Appeals Board.

The Applicant contended that existing water users' rights would be protected under the *Water Act* and by AENV's operational practices. During the hearing, the Applicant briefly described the priority scheme set out in the *Water Act* to protect licensees. The Applicant described the "first in time, first in right" provisions in which neighbours with licences automatically have priority with respect to water, and further explained that household users would have priority, if any licenced user interfered with a household user's water rights.

In dealing with the adequacy of the materials proposed for the EMS liner, the Applicant indicated that the additional geotechnical testing and evaluation demonstrated that the materials proposed for the manure storage facility would satisfy the soil parameters required to meet the *Standards and Administration Regulation*. In support of this assertion, the Applicant submitted EBA's May 2004 Report, "*Geotechnical Evaluation: Proposed Meinders Farm Hog Operation*."

The Applicant provided reports to support the position that the land base was sufficient to accept and incorporate manure, and met the requirements of the *Standards and Administration Regulation*. These reports were prepared by Agri-Trend Agrology Ltd. (Elston Solberg). A Preliminary Report dated December 18, 2002 and a Supplementary Report dated January 17, 2003 both concluded that the proposed spreading lands could safely accept manure application through implementing a sound nutrient management system. A Supplementary Report dated May 24, 2004 was provided following review of other interveners submissions; this Supplemental Report reiterated the confidence that Agri-Trend had that:

> "…manure can be effectively and safely managed, within the AOPA guidelines, to enhance soil and crop productivity of soils in the Grande Prairie area."

It further suggested that the proposed manure spreading lands would:

> "…benefit greatly from the judicious management of hog manure within an overall nutrient and crop production management process."

In addressing potential economic and community impacts, the Applicant submitted that the proposed project would provide positive contributions to both the economy and the community. The Applicant asserted that the project would bring significant economic benefits to the area. The Applicant indicated that the estimated cost of the project was $3.12 million, and that the construction phase over a period of 7 – 9 months would employ the equivalent of 16 persons at an estimated wage component of $475,000. Further, when operating, the project would employ six full time employees and four part-time employees at a combined annual wage expense of $273,000. The Applicant reported that the operation would use over 1,640 tonnes of grain annually at an estimated value of $262,000 and that the feed grains would be locally sourced. The Applicant added that the proposed project was consistent with the economic development goals of both the County and the Province, as the Applicant identified it as a "local value-added enterprise."

The Applicant submitted that the project would create additional local employment and that, "these employees and their families will become part of the community and contribute to the local community and economy." The Applicant also tendered case law documents to refute other interveners' submissions that neighbouring properties would be devalued by the presence of the proposed facility.

On the issue of odour, the Applicant identified a number of mitigative measures that would be implemented to address the odours associated with the facility (the barns, the EMS and the method for manure application). The Applicant identified a straw cover for the EMS, berming the site and planting trees, roof ventilation for the barn, misting in the barn to reduce dust and to reduce the need to run the fans in the summer, and other design features of the barn. The Applicant also advised that manure spreading would only occur in the fall, and that the appropriate equipment would be used to ensure manure would be direct injected successfully. In summary, the Applicant submitted that mitigative measures would be employed to ensure that the odours generated by the operation would not be greater than one would reasonably expect to occur in an agricultural area.

On the subject of the projected traffic that would be generated by the proposed project, the Applicant submitted that the operation would generate small traffic volumes in comparison to other agricultural operations like dairy barns or cattle feedlots. The Applicant asserted that the estimated traffic for the operation would not significantly add to the traffic volumes for the road. The Applicant also maintained that the proposed barn location is appropriate, providing access to the operation with minimal interference with residential development.

In connection with the public notification requirements being met for the Meinders water licence application, the Applicant submitted that the water licence application was locally advertised on two occasions. The Applicant submitted that this met the requirements as per the *Water Act*, and that the number of Statements of Concern filed with AENV demonstrated that affected parties were aware of the Meinders' water licence application.

The County of Grande Prairie

The County argued that siting the Meinders facility at the proposed location was inappropriate. It also asserted that the filed application was deficient, stating that it was not based on sound science, and further advised that the Applicant's proposal was in direct conflict with the County's MDP.

The County stated that the amended MDP is appropriate for the Board's consideration. The County further reported that there was a clear inconsistency between the application and the MDP, as the proposed operation would fall within an area identified as an exclusion area for confined feeding operation (CFO) development. The County reported that the proposed site was inappropriate as Section 6.23(c) of the MDP stipulates that:

> "…new CFOs will only be considered for approval if the site is not located within 3.2 kilometres of any lands zoned for intensive recreation ("IR") uses."

The County identified that both the Bear Lake Bible Camp and Bear Lake Campground are zoned as intensive recreation and are both located within 3.2 kilometres of the proposed operation.

The County also advised that under the amended MDP, CFOs are designated as an industrial use and are to be located within half a mile of a major, primary or secondary highway, and noted that the proposed site did not meet this criteria, as it would be located 1.5 miles from a highway. The County rejected the suggestion that the proposed project could be considered a discretionary use, noting that the categories for uses are identified as 'permitted', 'discretionary' or 'excluded,' and submitted that this use would clearly be deemed 'excluded'.

The County asserted that it does not take a position against CFO developments in general, but maintained that the proposed location for this facility is inappropriate. The County advised that the amended MDP was based on sound land use planning principles and suggested that the Board should rely upon this MDP.

With respect to the issue of the water volume requested for Meinders Farm, the County submitted that the Applicant had applied for less water than would meet the anticipated consumption needs per sow, based on AFRD's estimated daily consumption of 6.5 gallons of water for a farrow to late wean sow. It noted that an EBA report submitted by the Applicant had concluded that the aquifer could sustain a yield of 12,775 m^3 per year, while the license application was for 13,000 m^3 per year. It further submitted that the Applicant had not disclosed specific details regarding expected usage for the entire project.

In its submission, the County stated that:

> "…prior to any application being granted the Appellant must establish: a) The total water usage required for the proposed facility; b) That an adequate supply exists to meet the demands of the entire project; c) That the project will not unreasonably interfere with other water users; d) That the project will not negatively impact the aquifer or aquifer system; and e) That a bona fide, and verifiable, method to monitor water consumption will be put in place to ensure compliance."

The County provided evidence with respect to the issue of whether or not the aquifer would be able to supply the amount of water the Applicant applied for, without compromising the water available to other users. Subsequently, the County advanced its view that the evidence demonstrated that the Applicant had not established the adequacy of water supply and had not provided estimates based on sound scientific principles.

On behalf of the County, Omni-McCann Consultants Ltd. (OMCL) reviewed the reports submitted by EBA and provided a hydrogeological assessment (Exhibit 17, Schedule A). In its assessment, OMCL concluded that the EBA report was erroneous, deficient, and not scientifically valid. OMCL submitted that the geological/hydrogeological setting had not been adequately addressed, that the aquifer test did not meet AENV's guidelines for information requirements for a water licence with respect to pumping rates and the use of an observation well, and that the aquifer test had not been properly interpreted. It further reported that the information provided by EBA was insufficient to assess and properly evaluate the potential impacts to the aquifer or other users. The County contended that the application could not be approved, and submitted that the aquifer was not adequate to supply the amount of water required for the proposed operation.

With respect to the materials proposed for the construction of the EMS, the County submitted that it believed the supplemental evidence provided by EBA had established that the soils were adequate to construct the EMS liner to meet the standards. It further recommended that the procedures recommended in the EBA report should be applied to ensure the construction would be completed properly, should the project be approved.

With respect to the sufficiency of the land base for spreading and incorporating manure, the County submitted that prior to determining an adequate land base, an acceptable MMP would need to be provided and evaluated. However, it advanced its view that the land base is insufficient. To support this view, the County provided a *Report on Soil Concerns* prepared by Mr. Russell Bardak of Riverview Consulting Ltd. (Exhibit 17, Schedule B). This report asserts that the lands designated for manure application are not suitable to receive hog manure. The County also expressed concern that the application of hog manure to the lands would lead to "…unacceptable run-off and erosion."

In the report summary Riverview Consulting Ltd. prepared for the County, Mr. Bardak states:

> "The main limitation to suitability of the subject lands to receive applications of hog manure is the presence of the Kleskun soil series. Often the Kleskun soil series is closely and complexly associated with the Rycroft soil series. The solonetzic characteristics and the gleyed characteristics of these soils preclude the sustained application of hog manure in an environmentally responsible manner. Information presented indicates that elevated sodium levels already hamper these soils. Information gleaned from Meinders Farm pre-filed evidence indicates that the application of hog manure will increase the level of sodium. As such, it is concluded that it is not prudent nor environmentally responsible to apply hog manure to those subject lands with Kleskun or Kleskun/Rycroft soil map units."

This report further submitted that the Meinders application materials were incomplete and had employed incorrect methodologies.

The County asserted that the proposed project would have negative effects on both the economy and the community. The County stated:

> "The project will have a detrimental effect upon the social fabric of the community, will create conflicting land uses and will impact upon a bible camp of popular and long standing use."

With respect to economic effects, the County asserted that "CFOs and other odour related developments, have had a negative impact upon assessed values of land in other communities."

The County submitted that the information provided by the Applicant with respect to a traffic impact assessment was very deficient. It further submitted that the County's MDP requires that a traffic impact analysis be prepared by a qualified engineer "…to assess potential traffic impact, the suitability of available road services and provide recommendations for upgrading to County's roads, if required." It also submitted that developers are to enter into development agreements with the County.

The County also tendered a report prepared by EXH Engineering Services Ltd., which provided information regarding one of the roads designated for manure-hauling. The report recommended that Range Road 73 (as investigated from SH 672 south for 2.5 km) along the east boundaries of NE ¼ Sec 04 and East ½ Sec 09-73-07-W6 would require rebuilding or upgrading to accommodate an increase in traffic volume and axle-weights.

In connection with the issue of public notification of the Meinders Water Licence application, the County submitted that it felt that it was not adequately informed of the application or the process.

Bear Lake Area Farmers and Residents (BLAFR), Bear Lake Canuck Historical Society & Bear Lake Bible Camp

The BLAFR recommended that the Board uphold the decision to deny Application FA02011.

On the MDP issue, the BLAFR submitted that the Meinders Application is inconsistent with the County's MDP and that the County's amended MDP was the appropriate plan for the Board's consideration. The BLAFR further submitted that the County's finding of the Application's inconsistency with its MDP "… should be awarded great deference." It further submitted that the intent of *AOPA* "…was to grant municipalities an opportunity to deny an Approval if it did not comply with its land use planning considerations."

The BLAFR submitted that there were no assurances that the Applicant would only use the amount of water as applied for under the *Water Act*. Further, it identified that it did not believe that the NRCB's compliance staff could be relied upon to ensure the protection of the water supply, as it asserted that the NRCB had an inadequate number of compliance staff to enforce conditions placed by the Board.

The BLAFR submitted that the aquifer did not have an adequate supply of water to support the proposed operation. It further supported the findings of the hydrogeologist retained by the

County [Mr. Alan McCann, OMCL] and referenced a letter from Dr. G.G. Andreiuk to AENV, which indicated that the amount of water applied for by the Applicant would not be sustainable.

The BLAFR submitted that drilling new wells once others have been depleted by the operation would not resolve concerns with the aquifer, and submitted that the aquifer was already being negatively influenced and was showing signs of stress. Several community members advised that their wells had already been negatively impacted and expressed concerns that their water supplies would be compromised by the proposed project.

With respect to the adequacy of the materials proposed for the EMS, the BLAFR submitted that it understood the Applicant was able to achieve the necessary standards. Mr. Garry Coy, a soils expert representing the BLAFR, agreed that the hydraulic conductivity of the soils was very low.

The BLAFR submitted that the soil characteristics of the lands designated for manure application were not adequate or suitable for accepting manure. It further submitted that it could not be established that the lands designated for manure spreading for the existing facility were not already saturated with manure, as soil testing for those lands had not been provided. The BLAFR also raised a concern that the distance between the proposed operation and some of the manure spreading lands would not be practical or economical and that spring road bans would prevent hauling manure on these roads when the manure lagoons would require emptying. The BLAFR supported the opinion of the Soil Specialist advising the Approval Officer, that spreading manure on the lands would not be sustainable.

Mr. Coy stated that the lands designated for manure spreading were not suitable to accept hog manure. He described the properties of the solonetzic soils and described the limitations they possess and associated risks of applying hog manure to the proposed lands. He advised that the solonetzic soils pose several challenges for farming, and noted that injecting manure into these soils would be difficult, due to the soils' hardness and density. He stated that it is difficult to till the soil and that water easily erodes the soil by sliding apart the clay particles. He emphasized that adding hog manure would add significant quantities of additional soluble salts which would in turn increase the electrical conductivity. In his opinion:

> "…the existing crop restrictive properties of the solonetzic soils north of Bear Lake will be further heightened by the addition of hog manure."

He expressed concerns that adding water with a high sodium adsorption ratio (SAR) to the manure, and subsequently applying it to the land, would increase SAR values for the manure so applied and negatively impact crop growth by further deteriorating the soils.

The soils expert representing BLAFR also expressed concern that the west lands proposed for spreading contained an erosion channel that would likely carry runoff to Bear Lake in the event of a high input of water, such as could be expected following a rapid snow melt or a rainstorm. Several members of the BLAFR testified that the soils in the area and the proposed spreading lands were very difficult to work and that they were not appropriate for the application of hog manure. The BLAFR submitted that it would be impossible for the Applicant to properly inject manure into the proposed lands, and provided testimony as to their own experiences with the hard pan soils. They also asserted that the nature of the soils would prevent successful growth of

the trees proposed by the Applicant and would increase the possibility of runoff and contamination of nearby lakes or their own water supplies.

Community members asserted that they were not opposed to CFO developments in general, but believed the proposed operation was not well suited to their area. Several community members provided testimony with respect to the negative community impacts they believed would occur, if the proposed project were approved. The BLAFR advised the Board that other residents in the area supported them in their opposition to the project. The BLAFR submitted that the application would "…have devastating effects on the local community and will provide little, if any, lasting economic advantage to the local area." They also submitted that economic harm and negative community impacts would be experienced by the Bear Lake Bible Camp, Bear Lake Canuck Historical Society and the City of Grande Prairie. The BLAFR also advanced its view that the economic benefits projected by the Applicant (such as employment) would be counterbalanced by the devaluation of surrounding real estate.

The BLAFR noted that the MDS was meant to create an odour buffer between the proposed operation and their residences, but submitted that the community around Bear Lake includes many non-agricultural residences and recreational facilities for the use of the community and the City of Grande Prairie. They submitted that the presence of a CFO in close proximity to the Bible Camp would be a deterrent to children going to the camp, which would result in overall decreased attendance. They also submitted that the expected odours from the operation would greatly impact their quality of life and ability to enjoy the outdoors.

One of the residents, who owns a facility for processing fruit, submitted that the application of liquid manure on lands adjacent to his facility has the potential to cause economic impacts to his business. Mr. Arnie Meyer expressed concerns that this could cause fly infestations, dust problems due to the increased traffic and odours that could affect the quality of fruit produced. He also suggested that the odours could cause negative economic impacts to the "U-pick" portion of his business. He advised that two orchards (one in production and one slated for production the following year) represented yearly sales over $100,000. He expressed concern that the business could fail, if it lost its federal license due to odour and insect problems.

With respect to the traffic impact assessment for the proposed project, the BLAFR advised that it supported the findings and evidence submitted by the County. Community members also expressed concern that the proposed traffic routes could cause a safety concern, as traffic for the operation would be travelling along a school bus route.

Regarding the issue of the adequacy of public notification for the Meinders water licence application, although the BLAFR initially took the position that the public notification requirements had not been adequately met, it noted that parties who filed late submissions were still granted directly affected status. Subsequently, the BLAFR was able to address its concerns regarding water issues at the hearing.

Mr. Wilf Tolway

Mr. Tolway submitted his position that he did not support the Meinders' proposal and asked the Board to uphold the decision to deny it. In his final arguments, he suggested the Applicant had

failed to provide enough credible information to persuade him to believe that the facility was appropriate for the area.

Mr. Tolway submitted a number of concerns with the proposed location for the facility. He identified concerns that some of the lands designated for manure spreading were susceptible to wind erosion. He also submitted that negative odour impacts could be experienced by many people travelling by the manure spreading lands. He suggested that a daily average of 8500 vehicles pass by lands designated for manure spreading and suggested that people travelling by could be exposed to hog manure odours and drifting manure-laden soil particles, which he believed could cause detrimental health impacts. He also expressed concerns that wind-blown contaminated particles could reach the railroad and have the potential to affect transported goods. He submitted that this could cause "loss of returns to the agricultural sector as well as clean-up problems."

Mr. Tolway submitted that the proposed location for the facility was not appropriate for a hog farming operation, and suggested the naturally occurring soils in the area were not conducive to animal or mixed farming, which he submitted had led to the area becoming predominantly used for grain farming. He expressed concern that the soils in the area would not be able to sustainably accept the manure generated from the operation. This intervener also expressed concerns with the location, stating that he believed that if a flood were to occur, Bear Lake would be susceptible to contamination.

Mr. Tolway submitted that the equipment the Applicant planned to use for injecting manure would not be able to work properly on the hardpan soils, he therefore suggested that manure would be broadcast on top of the land, rather than properly incorporated. He also expressed concern with overloading the soils with salts, which he suggested would be an improper environmental practice.

Mr. Tolway also advanced his view that there would not be enough water to satisfy the requirements for the animals in the proposed operation.

4. VIEWS OF THE BOARD

Municipal Development Plan

Two MDPs of the County of Grande Prairie No. 1 ("the County") were relevant to the treatment of Application FA02011 made by Erik Meinders and Meinders Farm. The Approval Officer considered the consistency of the application with Bylaw No. 2360 adopted on April 22, 1998 and amended February 20, 2001 in arriving at his decision of January 16, 2004 (Decision Report FA02011). The second amendment of Bylaw No. 2360 was passed January 5, 2004 and is referred to as the amended MDP. Although the Approval Officer evaluated the application on the basis of the MDP, as it existed prior to January 5, 2004, the amended MDP was approved eleven days prior to the release of the Approval Officer's decision on January 16, 2004. Inconsistency with the superseded MDP was one of the reasons for the Approval Officer's denial of the application, and he indicated that the County's assessment of incompatibility also applied to the amended MDP. Although the Approval Officer considered this inconsistency to be related to the *Standards and Administration Regulations,* the Board agrees with Counsel for the BLAFR

that the inconsistency is with Section 20(1)(a) of *AOPA*. Since all parties agreed that the amended MDP was the law in force at the time the Board Review took place, the Board focused its attention on the compatibility of the application with the January 5, 2004 amended MDP.

The County is a municipality with a population greater than 3500, and pursuant to Section 632 of the *Municipal Government Act*, the County was required to pass an MDP. It is a municipality's statutory duty to develop and adopt a statutory plan that best addresses the long-term land planning needs of the municipality. It is also the ongoing duty of the municipality to update and amend its MDP at any time it determines necessary. Section 20(1)(a) of *AOPA* requires that an Approval Officer deny an application, if there is an inconsistency between the application and an MDP. The Board has a wider jurisdiction than the Approval Officer. Pursuant to Section 25(4)(g) of *AOPA*, upon review of an Approval Officer's decision, the Board must have regard for, but is not bound by, an MDP.

The Board understands that the purchase of property and the filing of an application for a proposed development do not, in themselves, create any vested rights for the purchaser to develop a CFO. In addition, there is no assurance that the MDP in place at the time the application is submitted will be the same MDP in place when the decision is made. The only crystallized entitlement granted by *AOPA* at the date of filing the application is the establishment of the required minimum distance separation for the proposed CFO.

The Applicant made a reasonable effort to determine whether his proposed development was consistent with the old MDP. He was apparently advised by his realtor that no inconsistency existed and the County agreed it would have been difficult for a producer to have reached any other conclusion based on a review of the old MDP.

Because of the complexities of this application, deficiencies it contained as originally presented, and the resulting time it took to complete, the amended MDP was adopted before the decision on the application was rendered. The possibility of an MDP amendment during the NRCB approval process is one of the potential consequences for a proposed CFO development; however, the Board recognizes that substantial time is necessary to properly conduct all of the required procedures to amend an MDP. Applicants are well served by providing thorough and complete applications to the NRCB that can be processed efficiently. The Board also recognizes that this is not an issue that is unique to agriculture or CFO development. It is common to land development generally, in both the urban and rural setting.

With the introduction of *AOPA*, Alberta Municipal Affairs, Alberta Agriculture Food and Rural Development (AAFRD) and the NRCB all encouraged municipalities to update their MDPs to identify future land use plans.

In a December 2002 document from Alberta Municipal Affairs entitled "*Confined Feeding Operations and Municipal Planning*" (Exhibit 17, Tab 3) it was suggested that municipal agricultural land use policies might include: "A description of the areas and locations where confined feeding operations are generally an acceptable land use,…" and:

> "A description of the areas and locations where the presence of confined feeding operations are likely to have negative impacts and therefore would not be a suitable land use."

The Board notes, in the same document, that Alberta Municipal Affairs intended that MDP provisions were to be "…strategic in nature, and should not resemble the traditional detailed regulatory contents of a land use bylaw…" nor were they to focus on specific development standards. The Board notes that municipalities were given direction that MDP policies should not conflict with matters within NRCB jurisdiction.

Many of the requirements contained in Section 6 of the County's amended MDP are clearly in conflict with matters within NRCB jurisdiction. In that respect, the County did not comply with the directions given by Alberta Municipal Affairs, AAFRD, and NRCB to avoid conflict between the requirements of *AOPA* and its requirements in connection with technical issues under the NRCB's jurisdiction.

The Board rejects the notion that it should feel obligated to impose the complex technical restrictions listed in the amended MDP, such as the requirement that CFO developers submit an environmental impact assessment or that a qualified consultant conduct a surface and groundwater impact assessment. In reviewing the June 2004 amendments to *AOPA*, the Board notes that in Section 20(1.1) and Section 22(2.1), there is clear direction that in considering whether an application is consistent with the MDP land use provisions:

> "…an approval officer shall not consider any provisions respecting tests or conditions related to the construction of or the site for a confined feeding operation or manure storage facility nor any provisions respecting the application of manure, composting materials or compost."

It is also significant that CFOs approved under *AOPA* are exempt from Part 17 of the *Municipal Government Act* by the operation of Section 618.1 of that Act which provides:

> "This Part and the regulations and bylaws under this Part respecting development permits do not apply to a confined feeding operation or manure storage facility within the meaning of the A*gricultural Operation Practices Act* if the confined feeding operation or manure storage facility is the subject of an approval, registration or authorization under Part 2 of the *Agricultural Operation Practices Act*."

The Board finds that the technical requirements in *AOPA* supersede those in the amended MDP. It also finds that requirements of a County which duplicate, overlap or conflict with *AOPA's* technical requirements cause unnecessary confusion for proponents making CFO applications and for affected parties trying to constructively advance their positions.

In evaluating the evidence, the Board assessed whether the County had demonstrated that it had a clear plan for assigning future land use within the County and that the planning process to update the MDP had proceeded in a transparent and fair manner. The amended MDP differed from its predecessor in that it identified CFOs as a separate land use category distinct from "extensive agriculture". In addition, it identified specific areas where CFOs were prohibited, outlined extensive technical requirements for CFOs to meet, and established required zoning changes following NRCB approval.

The Board has discretion to override the provisions of an MDP in the face of an inconsistency. While it must have regard for an MDP, it is not bound by it (Section 25(4)(g) of *AOPA*). In

exercising this discretion, the Board will evaluate the merits of a proposed CFO development against the provisions of an MDP in the context of the particular location, the specific development proposal, the particular terms of the applicable MDP, and other relevant factors such as the potential difficulties associated with "spot zoning."

In order to exercise this discretion, the Board finds that it must evaluate the rationale for the designation of a zone or area where CFOs are excluded by the terms of an MDP. In this case, the Board examined the appropriateness or rationale for the circular exclusion zone with the Bear Lake Campground and Bible Camp at its centre.

The Board finds that the appropriate areal extent of a buffer is a matter of judgment. There was evidence that at the January 13, 2003 County Council Meeting, Ms. Crerar, Counsel for the BLAFR, recommended that the MDP include a one mile buffer zone around environmentally sensitive areas. In addition, the Mistahia Health Region, in a January 2003 letter to the Approval Officer, also recommended a one mile buffer between Bear Lake and any lands used for manure disposal.

The Board notes that in *AOPA* the maximum MDS for a 1200 sow farrow-to-wean facility for a town or village with no buffer (category 4) would be 1677 metres (1.04 miles). However, the Board finds that the County buffer zone is not variable according to CFO facility size and recognizes that large CFOs can have an MDS of two miles. This serves to show the difficulties in trying to establish an appropriate sized buffer from recreational and environmentally sensitive sites. It is a matter of judgment and not a pure matter of science.

The County, with its planning personnel and via a public consultation process, determined that the circular zone, around the intensive recreation area, should have a two mile radius. The Applicant felt the exclusion zone should not be absolute and that insufficient rationale had been presented to justify it. Part of the justification for the exclusion zone presented by the County included consistency with the standard buffer applied to urban areas, with specific reference to minimizing odour impacts and the potential for runoff. The Board also notes that the intent to avoid land use conflicts was another reason presented by the County to justify the two mile buffer between CFOs and intensive recreational areas. The Board finds that it was unusual that the prohibited zone only extended north of Bear Lake and did not surround Bear Lake. However, there was no evidence that the MDP amendment process was conducted in a manner inconsistent with acceptable procedure.

The Applicant proposed that the NRCB should evaluate the impacts and compatibility of the proposed project with neighbouring land use and assess it as though it were a discretionary use application. Conversely, the County testified that under the amended MDP, the proposed CFO land use was neither discretionary nor permitted but was simply disallowed in the proposed area. The Board rejects the County's arguments that clearly imply that the Board should somehow be bound by the municipality's prohibition of CFOs in this, and certain other areas of the municipality.

The Legislature has empowered the Board to override the provisions of the MDP. Section 25(4)(g) of *AOPA* provides the Board with discretion which is analogous to a municipality's assessment of discretionary uses. While it must have regard for the wishes of the community, as

expressed in long term municipal planning documents, it clearly cannot simply accept the municipal prohibition of CFOs in a certain area.

The Board finds that the credibility of the amended MDP will be enhanced if the County applies it on a consistent basis when dealing with all CFO development in the County. Questions were raised regarding the County's inconsistent application of all parts of the amended MDP in its treatment of an application for a feedlot, elsewhere in the County, which is presently before the NRCB. The Board suggests that the County should demonstrate that it applies the policies set forth in the amended MDP consistently to all CFOs within its jurisdiction.

In dealing with inconsistency with the amended MDP, the Board has listened to the evidence presented by all parties and has made several findings. These findings are subject to the comments set out above regarding the amended MDP's technical requirements for CFOs being superseded by the technical application requirements established pursuant to *AOPA*. The Board's findings are as follows:

- The Board has decided that the amended MDP applies to the Meinders' Application.
- The proposed development is within the CFO exclusion zone of the amended MDP.
- There was inconsistency between the proposed development application and the amended MDP.
- The Board has jurisdiction to override the amended MDP.
- There are prospects of land use conflict between the proposed development and country residential and/or recreational use.

In reaching a decision with regard to exercising its discretion over the amended MDP, the Board considered the Applicant's supporting evidence of due diligence in land purchase, facility design for nuisance mitigation, limited rationale for the exclusion area boundaries, and the suggestion of applying a discretionary land use provision. On the other hand, the Board also considered the County and BLAFR's evidence including the appropriateness of amending the MDP, the fairness of the amendment process, the role of the amended MDP in mitigating potential land use conflicts, and the exercising of County responsibility for long-range land use planning, including identification of CFO exclusion zones.

The Board is therefore faced with the difficult challenge of passing judgment on the magnitude of an appropriate buffer zone. It is clear that, for the proposed facility, there is discrepancy between the MDS in *AOPA* and the two mile buffer proposed by the County. The Board is also cognizant of the fact that a significant portion of the manure spreading lands are located closer to the recreation center than the proposed facility. Also the Board notes that manure spreading lands are included in the exclusion zone for the County's amended MDP, but are not considered in *AOPA*'s MDS calculation. While the Board places a high priority on science-based decisions consistent with the regulations in *AOPA*, it recognizes that good planning judgment, supported by a transparent public process, must also be respected in the regulatory process.

On the balance of evidence regarding the inconsistency of Application FA02011 with the land use provisions in the amended MDP, in this specific case, the Board is not prepared to override the 3.2 km CFO buffer zone in the amended MDP. The Board finds that, as it relates to planning for future land use, the amended MDP was developed through a fair and transparent process that reflected the wishes of the County residents with regard to preserving this particular recreational

area, mitigating land use conflicts, and directing the future land use according to the wishes of the elected representatives and their constituents.

Earthen Manure Storage (EMS) Liner

Section 9 of the *Standards and Administration Regulation* specifies the construction standards for manure storage facilities. The Board received and heard evidence from the Applicant's engineering consultant (EBA) that the original engineering report was deficient with respect to demonstrating the suitability of the available clay till to construct a lagoon liner that would meet the *AOPA* standard.

In the original report, the engineering consultant specified that the hydraulic conductivity measured in the laboratory was 3.1×10^{-10} m/sec., which the Approval Officer confirmed would translate to a field value of 3.1×10^{-9} m/sec. When the Approval Officer made his decision, the *AOPA* standard for re-compacted clay liners was that the liner would have to be at least 1 metre thick and have a seepage rate equal to or less than 10 metres of naturally occurring material with a hydraulic conductivity of 1×10^{-8} m/sec. EBA agreed with the Approval Officer's decision, that based on the information provided in the application, the proposed liner design would not meet the previous *AOPA* standard.

EBA provided evidence that the optimum moisture content for re-compaction of the clay till was 19.5% moisture not 17%, as was used in the tests conducted by the original engineering consultant. At 19.5% moisture, the average laboratory permeability for the clay till was 2.7×10^{-11} m/sec, which would be equivalent to 2.7×10^{-10} m/sec in the field. EBA testified that based on its tests, a 0.27 metre thick liner constructed with the clays at the building site would meet the June 1, 2004 revised *AOPA* seepage rate equal to 10 metres of naturally occurring material with a hydraulic conductivity of 1×10^{-8} m/sec. In order to achieve a safety margin, the Applicant's engineer recommended that a 1 metre liner with a hydraulic conductivity of 2.7×10^{-10} m/sec be constructed.

The Board did not receive evidence to dispute the above findings or recommendations. The Approval Officer testified that he had reviewed the new test results and agreed with EBA's conclusions. The BLAFR's soil consultant also testified that the hydraulic conductivity of the soils in the area is very low.

EBA provided evidence that it had drilled additional boreholes to determine if there was 10 metres of undisturbed material below the proposed base of the EMS liner. Based on the drilling results, they concluded that the clay soils would also meet the *AOPA* standards for non-compacted naturally occurring material.

EBA also provided evidence that a quality control program could be implemented during the construction of the liner to ensure that it would meet the engineering specifications.
The Board finds that the clay till at the Applicant's proposed building site could be used to construct a liner for the EMS that would meet the requirements in the *Standards and Administration Regulation.* The Board also finds that the quality control program put forward by the Applicant's engineering consultant (EBA) would be appropriate for the construction of the liner.

Water Adequacy and Notification

Section 25(4)(j) of *AOPA* empowers the Board to consider concerns forwarded to AENV related to applications for a water licence. The Board received and heard evidence on a number of matters related to water use, supply, and the notification process for a water licence.

The application indicated that the proposed project would require 29.5 litres per day/sow or 12,921 m^3 per year of water for the farrow-to-wean operation. Several parties opposed to the application stated that the Applicant had underestimated the water use at the proposed facility. These interveners submitted that the operation would use 85.5 litres/day or 37,449 m^3 per year. These assumptions were based on estimates for farrow-to-finish operations, as identified in a paper entitled "*Water Usage and Manure Production Rates in Today's Pig Industry*" presented by Clarence Froese at the 4th Annual Swine Technology Workshop in 2002.

The Board also received evidence that the Applicant revised the *Water Act* licence application from 13,000 to 12,775 m^3 per year, when the hydrogeological consultant indicated that the aquifer could only sustain withdrawal of 12,775 m^3 per year.

The Approval Officer calculated that for a farrow-to-wean operation the water requirements would be 29.5 litres per day/sow or 12,921 m^3 per year, accounting for all uses. He also testified that there could be a 20% variance in water use between hog operations, thereby justifying the reduced volume requested in the licence application. The Board notes that the Froese paper reported that a farrow-to-finish operation used on average 89.5 litres per sow per day with a range from 71.1 to 110 litres per sow per day. Sixty four percent of this water use was from the "grow/finish production stage." Therefore, the Board finds that the farrow-to-wean stage would use, on average, 32.2 litres of water per sow per day.

The Board finds that the water requirements identified by the Applicant for a 1200 sow farrow-to-wean hog operation are adequate for the proposed operation. The volume of water requested (12,775 m^3 per year) is consistent with the range of water use identified by both the Approval Officer and in the report by Mr. Froese for a farrow-to-wean operation. The Board heard that the Applicant applied for and is still only planning to use one water supply well for the facility.

The Board received evidence from numerous parties with respect to how the Applicant could monitor water usage. AENV advised, in its letter dated May 25, 2004, that if a water licence was issued, it could include a condition requiring the licencee to install a cumulative flow totalizer on the well and to provide annual water use reports prepared by a hydrogeologist. The Applicant's hydrogeologist indicated that this type of condition was more typical of an industrial user than a farmer, but that it would be a reliable means of monitoring water withdrawal from the aquifer. The County's hydrogeologist also indicated that he had previously observed AENV's application of this type of condition.

The Board heard Mr. Tolway's evidence that a choke or restrictor could be placed on the well to restrict the well's flow. The Applicant advised that they were not in favor of placing a restrictor on the well as varying water demands existed at different times of the day. A restrictor could result in periodic water shortages, and the placement of a restrictor on the well would incur costs for the construction of additional water storage to meet surges in demand.

Based on AENV's May 25, 2004 letter, and the testimony, the Board finds that water withdrawal from the aquifer for the proposed operation could be monitored in accordance with the condition suggested by AENV. The Board recommends that, if a water licence were to be issued for this operation, it would be appropriate to include this condition.

The Board accepts the evidence provided by the Applicant outlining the priority that the *Water Act* places on water use and assurance of supply to water users. The Board also accepts the Applicant's evidence that the *Water Act* ensures that agricultural and industrial users, with licences and registrations, have priority over one another to the water supply, based on the date that they received their licence or registration ("first in time, first in right").

The Board finds that through the *Water Act,* there is a means of ensuring that claims respecting the impact on the aquifer by licenced water users can be investigated. The Board also finds that the province has a means of directing water licensees to remediate the effect their wells have on the other well users. The Board recommends that if a water licence is issued for this facility, it would be appropriate for AENV to consider including the conditions listed in its' letter of May 25, 2004.

The Board reviewed the evidence regarding the ability of the production zone of the well, which is between 54.9 and 58.5 metres, to supply the Applicant's water requirements without adversely affecting the water supply of other residents in the area who obtain their water from the same aquifer. The Applicant's hydrogeologist suggested that the production zone could supply 57 m^3 of water per day and the Applicant only required 35 m^3 per day. The Approval Officer indicated in his decision report that AENV was prepared to issue the Applicant a licence for 35 m^3 per day. However, AENV did not have a representative at the review to present evidence to substantiate its reasons for this commitment.

The County's hydrogeologist outlined several deficiencies in the water supply assessment reports submitted by the Applicant's consultant. The Board finds that the key deficiencies the County's consultant established were:

1. The pump test data were flawed in that a constant pumping rate (within a 5% variance), as required in Alberta Environment's *Groundwater Evaluation Guidelines* was not maintained during the test.
2. The method used to analyze the pump test data was not suitable. The analysis methodology was intended for data collected from an observation well.
3. The Applicant did not use an observation well to collect data, even though AENV's guidelines specify that one should be used for wells that are intended to supply 35 m^3 per day.
4. The absence of an observation well also meant that no reasonable values for storativity could be obtained from the pump test data. As a result, the amount of drawdown over distance could not be accurately predicted.

The Board finds that these are potential deficiencies to be evaluated by AENV. They raise doubt with regard to conclusively establishing that an adequate water supply exists within the well's production zone to supply 35 m^3 of water per day. The Board recommends that AENV require the Applicant to provide revised estimates on the ability of the aquifer to supply 35 m^3 of water per day and to reassess the potential impact of this level of withdrawal on the other wells within

a six kilometre radius of the Applicant's well. The Board further recommends that the Applicant should obtain AENV's approval of its revised protocol.

The Board also asked parties to respond to concerns that were raised about the public notification process for the Applicant's water licence. The Board received evidence from Alberta Environment in a letter dated May 25, 2004 indicating that the licence application was advertised on two occasions: on October 30, 2002 in the *Sexsmith Sentinel* which has a monthly circulation and on July 31, 2003 in the *Daily Herald Tribune* which has a daily circulation. AENV concluded that the advertising requirements under the *Water Act*, and its associated regulations for a water licence, had been met as they had received letters from all residents living within two kilometres of the Applicant's proposed facility. The hydrogeologists for the Applicant and the County testified that they were familiar with AENV's notice requirements for water licences. They did not believe that the advertisements or the process used for this application differed from their previous experiences.

The Board has reviewed the notice provisions in Section 13 of the *Water Act (Ministerial) Regulation, Alberta Regulation 205/98*. The Board finds that the July 31, 2003 advertisement in the *Daily Herald Tribune* satisfied the provisions in Section 13 that requires the notice to be published in a newspaper with daily or weekly circulation.

In summary, the Board finds that:

- The 35 m^3 of water per day requested by the Applicant would be sufficient to meet the needs of a 1,200 head farrow-to-wean hog operation.

- The Applicant applied to AENV to licence only one water well.

- Although the Applicant provided evidence that the production zone could supply 35 m^3 of water per day, the potential testing deficiencies identified by the County raise some doubt as to the well's ability to meet the needs of the proposed facility without affecting other users of the aquifer. The Board recommends that AENV evaluate the evidence introduced at this review and take appropriate action.

- Conditions could be placed on any Water Licence issued by AENV to ensure that the Applicant monitors the water use and responds to supply concerns of other well owners.

- The process that was followed to notify parties with respect to the Applicant's Water Licence application was consistent with the *Water Act Ministerial Regulation.*

Sufficiency of Land for Manure Spreading

Section 2(1)(j) of *AOPA*'s *Board Administration Procedures Regulation* requires that an application for an Approval include, "the legal description of the land where manure, composting materials and compost are to be spread for the first 3 years of the operation."

Table 10 of the *Standards and Administration Regulation* indicates that a land base of 205 ha is required for a 1200 swine farrow to wean operation involving liquid manure, assuming that the manure will be spread on a grey wooded soil. The selection of a grey wooded soil type is the closest soil match provided within *AOPA* for the subject lands. As part of its application, the Applicant proposed a land base of 1400 acres or 567 ha. Therefore, based on a one-time application, the Board finds that the Applicant has 2.8 times more land than required by *AOPA* on which to apply liquid manure from the operation.

The Approval Officer presented a thorough discussion of the nature of the proposed soils and their suitability to sustain long-term manure applications in Decision Report FA02011. The Board concurs with the Approval Officer's assessment that although the application has more than enough land base, according to the tables provided in the *Standards and Administration Regulation*, "the information provided shows that the conditions used to determine the land base tables may not be applicable to some of this land base." The Board also concurs with the Approval Officer's assessment that the manure application rate and frequency may be lower than the average values used to determine the land base in the calculations.

The Board heard two other key issues with respect to the sufficiency of land for manure spreading in this application. They were the potential for salts and sodicity from the liquid manure to increase the salt concentrations and sodicity in the soils proposed for spreading and the potential for the proposed equipment to be unable to successfully inject the liquid manure below the soil surface. Combined with the potential for unsuccessful injection, the Board also heard evidence describing the potential for runoff of liquid manure from the spreading lands and the impact of the runoff on surrounding lands and water bodies.

In any operation where there is addition of materials to soils, there is the potential to not only increase salt content, but also to alter numerous soil chemical and physical properties. The use of agricultural land for crop production almost always requires soil amelioration, through the addition of physical and/or chemical agents, to sustain and optimize crop growth. In this specific case, the Board believes that the concern about the potential salt loading and sodicity of the proposed soils is the result of the soil types included in the land base and the sodicity level of the source water.

The Board believes that the report prepared by Riverview Consulting and presented into evidence by the County provided a thorough overview of the soil types encountered in the proposed spreading lands. Unfortunately, it did not provide details such as topsoil depth and adequate surface soil chemistry that would allow the Board to better understand the capabilities of these soils to accept liquid hog manure on a sustainable basis.

According to information presented by the soil specialist who advised the Approval Officer, the properties of both the Rycroft series, but more specifically the Kleskun series, pose limitations to conventional manure application practices. He further stated that it may be necessary to restrict manure application rates and frequency to ensure that salts neither accumulate in the receiving soils nor migrate off-site.

The Board finds that all of the soil experts agreed that these soils need, at a minimum, to be carefully managed, regardless of the agronomic practice for which they are used. Experts from Riverview Consulting Ltd., Coy Consulting Inc., and the NRCB indicated that they would not

recommend these soils for the receipt of liquid hog manure. Theoretical information presented indicated that *AOPA* salinity regulations could not be met, however, no data predicting the salt concentration and sodicity levels from the manure slurry were available. The Board recognizes that theoretical calculations must be ground truthed and validated in order for the predictions to be relied upon.

The expert from Agri-Trend Agrology Ltd. indicated that, based on their corporate knowledge of the agronomic use of a wide variety of soils, they believed that the proposed soils could be used on a sustained basis for the receipt of liquid hog manure and the growth of crops. Agri-Trend Agrology committed that *AOPA* salinity regulations would be met and that mitigative options existed to ensure that sodium adsorption ratio from the manure slurry were managed. Again, the Board was disappointed that no specific data such as hog manure chemical composition, receiving soils chemistry, application frequency, or targeted application rates were presented which would allow the Board to make specific findings.

The Board notes, however, that *AOPA* is designed to be largely "self-regulating." Therefore, the onus is on the producer to ensure that the operation, including manure application, is managed so that all relevant regulations are met. In order to ensure that regulations are met, Section 28(5) of the *Standards and Administration Regulation* requires that owners or operators of CFOs keep soil test records for five years. These records must be made available to an Inspector and an Approval Officer can specify in an approval that the records must be submitted to the NRCB on a periodic basis.

The Board is not satisfied that that these soils could not be used for application of liquid hog manure. However, it agrees with all of the experts that these soils types, particularly the Kleskun soils, would need to be carefully managed in order to maintain their agronomic potential. The Board notes that the Applicant has applied liquid hog manure on the east land, which is primarily composed of Solonetzic soils and that the Applicant's west lands and surrounding lands are also being successfully cropped.

Further, the Board is not convinced that the proposed equipment for spreading the liquid manure would not be suitable. However, given the nature of the proposed soils, the Board recognizes that injection may be difficult and it is disappointed that the Applicant did not provide evidence that the proposed equipment had been successfully tested on the Head and west lands. Given that the Applicant owned the land and had access to liquid hog manure from the existing operation, a trial on the west lands would have provided useful knowledge for all parties.

The Board does not accept that there is a reasonable probability that large quantities of liquid manure being injected into the proposed lands will subsequently enter the drainage channel and ultimately Bear Lake. Based on the evidence provided and its own scientific expertise, the Board does not believe that the injected liquid hog manure from the west lands, applied at the maximum loading rates set out in *AOPA*, would be a significant contributor to the eutrophication of Bear Lake. The Board notes that these same lands adjacent to streams feeding Bear Lake are being fertilized with manufactured fertilizes and no concerns were raised about these materials entering the drainage channel and subsequently entering Bear Lake.

The Board notes that the Approval Officer stated in Decision Report FA02011 that if he had approved the project, he would have included a condition stipulating that a detailed MMP,

including “a detailed soil survey to identify areas with solonetzic soils and that characteristics of those soils, proposed manure application rates, timing of manure application, setbacks from common bodies of water etc…” be submitted to the NRCB prior to manure application. The Board concurs with the Approval Officer that an MMP would be necessary in order to fully assess the suitability of the proposed lands for liquid manure application. The Board believes that it should specifically address the feasibility of the proposed injection equipment to deliver the liquid manure as planned and the calculation of proposed salt loading, based on best estimates of salt inputs into the liquid manure.

The Board concurs with the Approval Officer that there are situations where additional steps are required beyond evaluating the land base outlined in the regulations to ensure that the project will be sustainable. The Board finds, in cases like this, where the proposed manure spreading lands are recognized as having agronomically limiting characteristics, that it would be prudent to consider requesting an MMP as part of the application process. This would allow the Approval Officer to fully evaluate whether the manure spreading lands are compatible with the proposed activities, prior to reaching a decision.

The Board is of the view that these soils could be used for application of liquid hog manure, and that there was a sufficient land base available to meet the requirements of the regulations, assuming that the Applicant implemented an appropriate MMP.

Effects on the Economy and Community

Section 25(4)(k) of *AOPA* requires the Board, upon a review, to consider the effects of the proposed confined feeding operation on the environment, economy, community, and the appropriate use of land. The Board believes that it fulfilled its *AOPA* mandate of assessing the environmental impact of the application by addressing the outstanding issues related to manure spreading, as well as the water issues. The Board also believes that by considering the compatibility of the MDP with the proposed project, that the appropriate use of land component of Section 25(4)(k) is addressed. Therefore, the only additional area where the Board asked the parties to provide evidence on the potential impacts of this proposed project was on the economy and the community.

Prior to determining the effect of the proposed hog barn on the community and the economy, the Board needed to establish the community affected by the proposed project. The Board concluded there were two communities to consider, including:

1. The farmers and landowners immediately adjacent to the proposed hog barn and manure spreading lands (local community).

2. Other county residents and citizens of the City of Grande Prairie using the recreational facilities (regional community).

The County provided evidence that two goals of their amended MDP were:

1. To limit the potential for conflict between provincially approved CFOs and other land uses in the County, including extensive agriculture operations.

2. To provide for policies that would allow the County to develop as an agricultural, commercial, industrial, and residential community.

The County, with the assistance of the City of Grande Prairie, testified that they see significant growth occurring in the County and the City. The Board accepts the growth predictions of the County and the City. The Board also accepts that the County must consider the long-term needs of all residents for recreation, residential, and economic development. The Board also accepts the evidence put forward by the County and the BLAFR that non-agricultural developments, such as country residential, and historic parks, are occurring in the vicinity of Bear Lake and that these other types of developments are likely to increase in the future, due to the proximity of the lake to the City of Grande Prairie and the Town of Clairmont. The Board finds that if the proposed project were approved, it could affect future recreational and residential development. The Board finds that the County, through its amended MDP, is attempting to ensure that the regional community will continue to have these opportunities.

The Board heard many concerns from the BLAFR, County, and Bible Camp about the odours that they believed would be generated by the proposed barn and manure spreading. The Board feels that this is the major issue the community has with this proposal. The Board is aware that the Applicant intends to minimize the odours by incorporating the manure in the fall, placing a straw cover over the lagoon, venting the barn with chimney fans, minimizing the amount of manure storage in the barn, and employing an oil dust suppression system. The Board is also aware of the evidence submitted by the County in the paper, "*Some Ideas on Water Usage, Odor Control and Nutrient Balance*" where 77% of the neighbors living adjacent to hog operations indicated that odour from the operations did not significantly impact their lifestyles. The Board finds that the Applicant proposes to use odour and manure management techniques that were referenced in the report as being effective techniques to reduce odour from hog operations. However, the Board also finds that the residents were not convinced that these measures would be effective.

The Board finds that the BLAFR considers their community to be made up of extensive agriculture and acreage ownership. However, the Board heard that some of the farmers and landowners have previously raised livestock, including hogs.

The Board heard that the Applicant believed that the proposed facility would be appropriate in this agricultural area. The Applicant advised the Board that because of his experiences in the Netherlands, he knew that construction and management design to mitigate odours was important to maintain a good relationship with neighbors. The Board also heard that the Applicant hired a consultant to help contact residents in the vicinity of the proposed project to provide them with information and to determine if they had any concerns. The Board heard that the Applicant did not complete the residents' consultation program due to their unfavorable responses and their failure to return calls.

The Board finds that the Applicant was aware of the impact this project could have on the local community, since he had firsthand experience in the Netherlands and with his current operation at the east lands. The Board finds that the Applicant tried to meet with the neighbouring landowners to provide them with details about the project, to become aware of their concerns,

and to identify how he might address them. The Board finds that these actions by the Applicant were appropriate and are consistent with good operating practices for CFO developers.

The Applicant provided evidence that the proposed facility would be built in an agricultural community. The Applicant submitted that due to the economic situation facing the agricultural industry, diversification of agricultural industry within the County should be regarded as a benefit to the community. Experts also suggested that the MDS provisions in *AOPA* and odour reduction features of the barn design would minimize the impact of the operation on the neighbouring farms.

The Board accepts the argument of the Applicant's planning expert that the Applicant was proposing to locate the project within an agricultural community. It was not until the recent amendments to the MDP that the County specifically identified a CFO as not being an agricultural operation and that CFOs should not be located on lower quality agricultural land.

The Board noted that the County provided evidence that it considers CFOs as different than other forms of agriculture in the County and that it currently has only 10 CFOs. It advanced its view that it believes that CFOs are most similar to heavy industry and has, therefore, excluded CFOs from the definition of an agricultural operation.

According to the definition of an agricultural operation in *AOPA*, a CFO is an agricultural operation. The Board accepts the reasons provided by the Applicant's planner that CFO's could locate in areas designated for agriculture. The Board does not accept the premise that because a CFO is not defined as an agricultural activity in a county's MDP, the CFO should not be located in an agricultural community where extensive agriculture is the primary agricultural activity. The Board believes that Part 1 of *AOPA* includes provisions for landowners to resolve disputes related to nuisances and that this approach, as opposed to excluding CFOs from agricultural areas, is the appropriate means of addressing nuisance issues between landowners.

The Board accepts that the County has determined that the most productive agricultural lands should be retained for agriculture and that other developments should be directed to the less productive agricultural lands. The Board also accepts that by directing CFOs away from lands with lower productivity, there may be fewer conflicts between the different developments, if it attracts more intense uses along the lines of country residential or recreational use as opposed to extensive agriculture. The Board finds that the County has identified the lands adjacent to Bear Lake in the vicinity of the proposed project as being lower quality agricultural lands and as being suitable for recreational and country residential development. The Board acknowledges that, in this particular case, it is a realistic expectation that other non-agricultural developments are likely to locate there.

The Applicant supplied economic information about both the construction and operational phases of the project. The Board finds that the proposed project would create jobs and contribute to the diversification of the agricultural industry in the Grande Prairie area. However, limited evidence was provided to explain the economic impact of the project. Although an AAFRD *Economic Livestock Impact Calculator* was submitted (Exhibit 8), no details were provided. Therefore, the Board finds that although the investment dollars required for this facility were presented, it cannot make definitive findings on the economic impact of this project.

With respect to the impact this project would have on the property values of the BLAFR, the Board finds there is no evidence to conclude that there would be an automatic reduction in property values, if the project were to proceed. The County entered into evidence a decision of the Municipal Government Board ("MGB") where it upheld the decision of the County of Lamont's assessor to increase the assessed value of properties adjacent to a CFO. The Board agrees with the Applicant that the MGB did not find reasons to substantiate the original reduction in assessed property values. The Board also notes that while the County contends that CFOs can reduce adjacent property values, the County did not enter into evidence any property assessments it had issued for properties adjacent to the 10 CFOs in the County (which includes a hog operation owned by the Applicant) where it had reduced the assessment values because of the CFOs.

The Board concludes that, based on the evidence submitted, this project would likely have a positive economic impact for the County's agriculture industry. However, in light of the current and projected rate of development in the region, the economic impact of the project would likely have a very minimal impact on the overall regional economy.

The Board believes that the proposed project, as designed, would be compatible with other activities in most agricultural communities. However, in this instance, the presence of the intensive recreational area creates a unique circumstance. The Board finds the County identified the uniqueness of the recreational area and proactively ensured that future development is controlled to prevent future land use conflicts.

Traffic Impact Assessment

When the Board granted a review of Decision Report FA02011, it did not specifically identify traffic impact as an issue to be addressed. However, at the Pre-Hearing Meeting, the County felt the Board should hear evidence on the traffic impact assessment that had been prepared for the proposed project. Since Section 25(4)(h) of *AOPA* directs the Board to consider items that would normally have been considered by the County if a development permit were being issued, the Board agreed to expand the issues to include, "Does the traffic impact assessment provide additional information that should be included in the evaluation of this proposed project."

Since the County felt the traffic impact submissions from the Applicant were inadequate, it engaged the services of EXH Engineering to prepare a traffic impact assessment. The Board acknowledged the County's concern for the infrastructure impact of new developments, but agreed with the Applicant that only 1.5 miles of R.R. 73 would be impacted. Although EXH Engineering indicated that this road had only been constructed to 1940 standards and was vulnerable to damage in wet weather, the Board finds that the traffic impact of the proposed facility would be low following construction. This finding was supported by the fact that much of the manure was to be transported across the fields, thereby avoiding the roads.

The Board concluded that with a provincially maintained highway so close and with the farm truck traffic already present from neighbouring farms, the County road infrastructure impact from this proposed operation would be minimal.

Review Process

The quasi-judicial tribunal process is well established within Alberta and has been successfully used in many areas including worker compensation, the regulation of the oil and gas industry and human rights issues. Although processes may differ between the different tribunals, the fundamentals of fair, open and transparent reviews or hearings underlay the processes, regardless of the issue under consideration. The application of this process to the regulation of CFOs is new, but is based on a successful history of the process.

In order for the Board to make the best decision in the interest of Albertans, the onus is on all parties of a review to participate in an open manner that facilitates getting accurate information on the record. The Board expects all parties to be respectful of both the process and all parties involved. The Board's goal in conducting a review is to ensure that it has the evidence required to make a decision on the issue in front of it and that the review proceeds in a respectful and timely manner.

The Board is very conscious of the financial implications of the review process to all parties. To that end, the Board expects all parties to meet submission deadlines, to participate in all aspects of the review including any preliminary meetings and to limit verbal presentations to the Board to only the key points that they wish to raise. Panel members have reviewed all of the written submissions filed before the review begins and do not need to have the content of the written materials repeated to them verbally during the review. At the review hearing the emphasis during direct examination should be on clarification only.

The Board's mandate is to make decisions of public interest in a fair, open and transparent manner. It takes this mandate very seriously and the organization has been structured to ensure that all proceedings are fair, open and transparent. In order to deliver its mandate in the area of confined feeding operations, numerous arms of the NRCB are involved in the process. The Board members, from whom the Chair draws up the Panels, are not involved in any operational aspects of the organization and only become involved in specific files, once a request for review has been filed. Attendance at the Board discussion to determine if a review should be granted is limited to the Board members, General Counsel, Manager of Board Reviews, and the Secretary to the Board. In making its determination, the Board only considers information specific to the file that is on the public record.

Approval Officers, Inspectors, and any other NRCB staff who have been involved in a review file do not have access to the Board members concerning the file. There is a Science and Technology group within the NRCB's organization, which is composed of technical specialists who provide expert advice to all parts of the organization. In order to ensure fairness, the Board never uses in-house experts, who have already been consulted by either the Approvals or the Compliance and Enforcement Divisions, when dealing with a file. If the Board identifies the need for an expert and one is not available internally, it retains an external consultant who works exclusively for the Board.

Counsel working for the Board meets with any experts engaged by the Board to ensure that any procedural questions of the Board are answered as well as to ensure that the experts provide the Board with any technical background information requested by the Board. Board Members have diverse technical backgrounds and often conduct reviews without any expert assistance. In the

interests of ensuring that the evidentiary record is complete, Board Counsel will often ask questions of the parties. These questions may have originated from the Board or experts advising the Board. In addition, Board members may choose to ask questions themselves.

The NRCB has followed this type of questioning process throughout its history and believes that the public interest is well served. The Board believes that this format meets the tests of natural justice and ensures that a thorough record is obtained. The Board does not agree that questions from Board Counsel should be restricted to only points of clarification.

The Board would like to address the process used to define or narrow the issues of a review before the review begins. As noted earlier, the Board recognizes the financial costs of a review for all parties and believes that everyone is well served by clearly defining the issues that the Board will review. It has been the Board's experience that all parties are better able to prepare when the issues are well defined. In some cases, the Board completes this step during its deliberations granting the review. In other cases, the Board decides that the information in front of it during its deliberations is not sufficient to allow it to fully determine all of the issues that will be heard. In those cases, the Board may decide to hold a Pre-Hearing Meeting to hear parties' views on the issues to be considered. After a Pre-Hearing Meeting, the Board will issue a report that outlines what issues it will hear based on the input received during the Pre-Hearing Meeting.

There are circumstances when new issues arise during the evidentiary portion of a review. When this occurs, the Board will hear evidence from parties as to the relevance of the issues to the file under review, and then it will make a ruling as to whether it believes that the issue is relevant. The Board may make these rulings as the review proceeds or alternatively during its deliberations as it weighs the evidence. If, during the Board's deliberations, it determines that there are additional matters that it needs to hear about, it always has the option to re-open a review and call for new evidence.

Additionally, the Board would like to clarify what it believes is the role of experts brought to the review by parties. It is not helpful to the Board if the experts advocate the position of whomever they are representing. Rather, the role of experts is to present their own professional opinions in the areas where the Board has accepted them as expert. Providing evidence in areas where an expert has not been qualified takes up valuable hearing time and does not assist the Board. The Board typically attaches very low weight, if any, to evidence provided in this manner.

The Board continues to develop its mandate of the delivery of *AOPA* and has made changes to its process throughout the last 2 ½ years, when it has identified the need to do so. These changes have been implemented on a go forward basis, which means that there is often a time lag before the change has been fully integrated into our process. One such change is that General Counsel now acts exclusively for the Board, while our second Counsel acts on behalf of the rest of the organization including the Approvals and Compliance and Enforcement divisions. This particular application came through our process before we made this change and that was why General Counsel represented the Approval Officer during this review. The Board hopes that those involved with *AOPA* reviews will contact the NRCB Law and Reviews group before the review to ensure that they understand the process and are able to fully and effectively participate.

5. BOARD SUMMARY

- The Board finds that the technical requirements in *AOPA* supersede those in the amended MDP and many of the County's requirements duplicate, overlap or conflict with *AOPA's* requirements. It is the *AOPA* technical requirements that will be applied. In addition to science based decisions consistent with the regulations in *AOPA*, the Board recognizes that good municipal land use planning judgment, supported by a transparent public process, must also be respected in the regulatory process. The Board finds that the amended MDP was developed through a fair and transparent process that reflected the wishes of the County. Based on the unique circumstances of this specific case, the Board has decided to uphold the amended MDP's 3.2 km CFO buffer zone centered at Bear Lake Campground and Bear Lake Bible Camp.

- The Board believes that this project, as designed, would have a positive economic impact and that it would be compatible with other activities in most agricultural communities. However, in this instance, the presence of the intensive recreational area creates a unique circumstance. The Board finds the County identified the unique features of the recreational area and proactively ensured that future conflict in land use development is controlled.

- The Board is of the view that these soils could be used for application of liquid hog manure, and that there was a sufficient land base available to meet the requirements of the regulations, assuming that the Applicant implemented an appropriate MMP.

- The Board finds that the evidence confirmed that the materials proposed to be used to construct the EMS liner would meet Section 9 of the *Standards and Administration Regulation*.

- Although it does not have jurisdiction to issue a water licence, the Board determined that there were potential deficiencies identified with the analysis of the aquifer capacity completed by the Applicant. The Board finds that these potential deficiencies raise enough doubt regarding the sufficiency of water, that it recommends that AENV evaluate the evidence introduced at this review hearing and take appropriate action.

6. BOARD DECISION

Following consideration of all of the evidence, the Board hereby denies Application FA02011.

DATED at CALGARY, ALBERTA, this 17th day of August 2004.

Original signed by:

Gordon Atkins	Sheila Leggett	Wayne Inkpen
Division Chair	Board Member	Board Member

BOARD DECISION

RFR 2018-11 / RA18016

In Consideration of Requests for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA18016

500016 Alberta Ltd.

September 21, 2018

Background

On July 31, 2018, NRCB approval officer Lynn Stone issued Decision Summary RA18016 in relation to the confined feeding operation (CFO) proposed by 500016 Alberta Ltd. at NE 34-43-26 W4M in Ponoka County (County). 500016 Alberta Ltd. sought approval for a new 400 milking cow dairy (plus associated dries and replacements). The proposed CFO includes the construction of a new dairy barn, heifer barn, and a concrete liquid manure storage tank. The approval officer considered this application in Decision Summary RA18016 and issued an approval with conditions.

Pursuant to section 20(5) of the *Agricultural Operation Practices Act* (AOPA), Requests for Board Review (RFRs) of Decision Summary RA18016 were filed by directly affected parties Debra Stott, Shelly Wright, and Blake and Rose Butterfield. All RFRs were filed within the 10-day filing deadline established by AOPA.

Following receipt of the RFRs, all parties were provided with copies of the requests, and notified of the Board's intent to meet and deliberate on this matter. Directly affected parties with an adverse interest to the matters raised in the RFRs were provided the opportunity to make a rebuttal submission in response. The Board did not receive any submissions that met the September 4, 2018 filing deadline.

The Board convened to deliberate on the RFRs on September 7, 2018.

Jurisdiction

The Board's authority for granting a review of an approval officer's decision is found in section 25(1) of AOPA, which states:

> *25(1) The Board must, within 10 working days of receiving an application under section 20(5), 22(4) or 23(3) and within 10 working days of the Board's determination under section 20(8) that a person or organization is a directly affected party,*
>
> *(a) dismiss the application for review, if in the opinion of the Board, the issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit, or*
>
> *(b) schedule a review.*

The Board considers that a party requesting a review has the onus of demonstrating that there are sufficient grounds to merit review of the approval officer's decision. Section 14 of the *Board Administrative Procedures Regulation* describes the information that must be included in each RFR.

Documents Considered

The Board considered the following information:

- Decision Summary RA18016, dated July 31, 2018
- Approval RA18016
- Technical Document RA18016

- RFRs filed by:
  - Debra Stott
  - Shelly Wright
  - Blake and Rose Butterfield
- Ponoka County Municipal Development Plan
- Portions of the public file material maintained by the approval officer.

Board Deliberations

The Board met on September 7, 2018 to deliberate on the RFRs.

In its deliberations, the Board considered each RFR filed by the directly affected parties and the various issues raised. The Board must dismiss an application for review if, in its opinion, the issues raised in the RFR were adequately dealt with by the approval officer or the issues are of little merit. The issues raised in the RFRs include odour, dust, noise, traffic, and water quantity and quality. In addition, the RFRs raised issues related to the timing of the approval officer's decision in relation to potential amendments to the County's municipal development plan (MDP), whether the CFO is consistent with the County's current MDP, and the potential to limit the location of future residences on their property resulting from a provision of the current MDP.

Nuisance and Environmental Effects

In Decision Summary RA18016, the approval officer considered the issues raised by the directly affected parties related to odour, dust, noise, traffic, and water quantity and quality. The Board understands that the RFRs, like the statements of concern to the approval officer, raise concerns about the direct effects from the proposed CFO, as well as the cumulative nuisance and environmental effects associated with confined feeding operations. AOPA provides a province wide regulatory framework to manage CFO effects within agricultural communities. It does so by establishing regulatory siting, construction and operating standards that apply in relation to each application and operation. That said, and as noted by the approval officer, the Board has consistently stated that cumulative effects are not within its regulatory mandate. Approval officers and the Board must, however, ensure approvals issued under AOPA are consistent with regional plans under the *Alberta Land Stewardship Act* (ALSA). Under ALSA, cumulative effects are considered and provide for protection to surface water, groundwater and air quality. Cumulative effects under ALSA are not related to the concentration of any particular industry but rather the cumulative impact of all human activity on the landscape. Further, ALSA does not explicitly deal with cumulative effects resulting from nuisance impacts. To date, regional plans have been adopted by Cabinet for the Lower Athabasca and South Saskatchewan River basins. Ponoka County will be covered by the Red Deer River basin regional plan; this plan is in the development stage and currently not in effect.

AOPA responds to potential environmental effects through a point source regulatory approach. AOPA regulatory standards require manure collection and storage facilities to be constructed and operated in a manner that will protect surface and groundwater. AOPA regulations also include manure spreading provisions that recognize the value and importance of livestock manure as a fertilizer, and that provide protection to the environment. Manure spreading regulations reduce environmental risk through soil nutrient limits and spreading setbacks from common bodies of water.

The Board has reviewed the relevant components of the approval officer's public file material, as well as her analysis in Appendix B of Decision Summary RA18016, and finds that the approval officer adequately considered nuisance issues, and issues related to water quality and water quantity.

Cumulative effects associated with the number or concentration of confined feeding operations within any given area are not a relevant consideration under AOPA, and as such this issue is not under consideration by the Board and does not merit review.

MDP Issues

The RFRs raised three issues related to the County's MDP:

1. the timing of the approval officer's decision in relation to potential amendments to the County's MDP,
2. whether the CFO is consistent with the current MDP, and
3. the potential to limit the location of future residences on their property resulting from a provision of the current MDP.

Should the approval officer have waited for Ponoka County's MDP amendments?

Both the Debra Stott and Shelley Wright RFRs assert that the approval officer acted inappropriately or in bad faith by issuing the RA18016 approval while the County was in the process of reviewing its MDP. Debra Stott's RFR indicated that some of the proposed amendments to the County's MDP may create a CFO exclusion zone that, if adopted, would include the proposed CFO site in the NE 34-43-26 W4M. The approval officer record includes a letter to the approval officer from Ponoka County dated June 26, 2018 asking that the approval officer defer her decision until "our planning review process is complete". The approval officer record also includes the County's May 4, 2018 letter to the Minister of Agriculture and Forestry asking for "a 90 day moratorium on further applications within this area to allow us the time necessary to complete our work." The Board notes that the approval officer record includes a letter from the Minister declining the County's request that the NRCB not issue decisions for a 90 day period.

The Board does not find bad faith in the approval officer's choice to issue a decision when the County was in the process of reviewing its MDP. The NRCB's written policy and past Board decisions both direct the use of the MDP in place at the time the approval officer decision is issued. Furthermore, the approval officer issued her decision during the early stages of Ponoka County's review process. The Board notes that the County's website shows a public information meeting for the MDP amendments slated for October 2, 2018, a full nine weeks after the approval office issued her decision. The Board finds that the approval officer's choice to issue her decision using the MDP under force at the time is entirely consistent with standing NRCB policy, was done in the ordinary course of business, and does not warrant Board review.

Is the CFO location consistent with the current Ponoka County MDP?

The Shelley Wright RFR asserts that the approval officer failed to consider two water bodies (Lake Pofianga and McFadden/Sigistrom Lake) as lakes, with the result that the approval officer failed to find that the CFO was inconsistent with the MDP. Section 2.5 of the MDP states:

> The County requests the NRCB not to allow CFO's closer than two miles to any lake unless the regulators are convinced that the manure management system is fail-safe and there is no reasonable risk of contamination of the lake. [emphasis added]

The approval officer determined that the water bodies were not lakes as they were not listed as lakes on either the County map or the relevant land titles, nor did the County identify any lakes in their

response to the approval officer. The Board notes that the approval officer's conclusion is further supported by the County's June 26 letter to the approval officer which stated that "the CFO meets the current municipal setbacks" and "is consistent with our existing Municipal Development Plan." That said, the Board finds that it is not necessary to determine whether the lakes referred to in the RFRs as Lake Pofianga or McFadden/Sigistrom Lake should be considered as lakes within the intended meaning of section 2.5. The Board interprets the "unless" provision in the section to establish a setback requirement only when the NRCB determines there is a reasonable risk of contamination to the lake. Having regard for the approval officer's comprehensive consideration of the planned facilities and the included approval conditions, the Board finds that the proposed manure management facilities associated with the CFO meet all regulations under AOPA; and, there is no reasonable risk of contamination to either water body. Further, the Board finds no evidence submitted or suggested in the RFRs that contradict this finding.

Although not required for this decision, the Board notes that the distance of the proposed CFO facilities to Lake Pofianga and McFadden/Sigistrom Lake substantially exceed the AOPA calculated minimum distance separation to even the most sensitive receptor residence. The purpose of the AOPA minimum distance separation is to establish a calculated setback from manure storage facilities to residences in order to manage nuisances associated with CFOs. The CFO facilities are approximately 3000 m from Lake Pofianga and 2700 m from McFadden/Sigistrom Lake. By way of reference, the calculated minimum distance separation for the proposed CFO to residences ranges from 449 m to a rural residence to 1198 m to residences in large-scale country residential, rural hamlet, village, town or city. In past decisions, the Board has consistently respected municipal setbacks to public recreational facilities when it finds that municipal development plan setbacks are reasonable and established to support current and future land uses. When assessing MDP land use provisions that deal strictly with environmental protection related to CFOs, the Board will generally rely on AOPA standards as they provide the statutory tool to accomplish those objectives.

Future Residential Development

Finally, the Board considered issues raised in the RFRs related to the potential of approving this CFO to limit the development of future residences on their property resulting from MDP section 2.7 that states "the county will protect existing CFOs by not normally issuing a development permit for a new residence within the Minimum Separation Distance of an existing or approved CFO….". This section may limit a neighbouring landowner's ability to obtain a development permit from the County in the future. AOPA establishes that minimum separation distance is calculated to residences that exist at the time a proponent files his initial application with the NRCB. The Board finds that this issue has no merit in the context of a NRCB review under AOPA as residential development applications rest exclusively with the planning and development jurisdiction of the County.

Decision

As a result of the Board's deliberations, the Board finds that the issues raised in the filed Requests for Review either have no merit, or were adequately considered by the approval officer, and therefore does not direct any matters to a hearing. The RFRs are denied.

DATED at EDMONTON, ALBERTA, this 21st day of September, 2018.

Original signed by:

_____	_____
Peter Woloshyn	Sandi Roberts
_____	_____
Keith Leggat	Daniel Heaney

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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.

Alberta Regulation 266/2001

Marketing of Agricultural Products Act

EGG PRODUCTION AND MARKETING AMENDMENT REGULATION

Filed: December 21, 2001

Made by the Alberta Egg Producers Board on December 13, 2001 pursuant to sections 26 and 27 of the Marketing of Agricultural Products Act.

1 The *Egg Production and Marketing Regulation* (AR 293/97) is amended by this Regulation.

2 Section 10.1 is amended by striking out "24" **and substituting** "24.4".

3 Section 24(1) is amended by striking out "$6.00" **and substituting** "$5.978".

4 Section 24.1(1) is amended by striking out "$.25" **and substituting** "$.245".

5 This Regulation comes into force on December 30, 2001.

Alberta Regulation 267/2001

Agricultural Operation Practices Act

STANDARDS AND ADMINISTRATION REGULATION

Filed: December 21, 2001

Made by the Deputy Premier and Minister of Agriculture, Food and Rural Development (M.O. 40, 2001) on December 18, 2001 pursuant to section 44(2) of the Agricultural Operation Practices Act.

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Manure Storage

Nutrient Management

Part 2
General Administration Matters

Definitions

1(1) In this Regulation,

(a) "Act" means the *Agricultural Operation Practices Act*;

(b) "aquifer" means an aquifer as defined under the *Water Act*;

(c) "catch basin" means an excavation or a diked or walled structure that is designed to intercept and store runoff, or a combination of structures;

(d) "common body of water" means the bed and shore of an irrigation canal, a drainage canal, a reservoir, a river, a stream, a creek, a lake, a marsh, a slough or another exposed body of water, but does not include

confined feeding operation required to be approved or registered under the Act or with a manure storage facility required to be authorized under the Act.

(5) This Part applies to a person who applies manure.

(6) A person to whom this Part applies must maintain the agricultural operation in accordance with the standards under this Part.

Minimum distance separation

3(1) An approval officer and the Board must not issue an approval or registration for a confined feeding operation or an authorization for a manure storage facility unless the minimum distance separation for the operation or facility on the date the application is received by the Board complies with this section.

(2) The minimum distance separation must be determined using Schedule 1 for the date the application is received by the Board.

(3) Before the application is complete the approval officer must provide, on request by the applicant, a preliminary determination on the expansion factor or technology factor to be applied to the application for the determination of the minimum distance separation.

(4) The minimum distance separation for the date the application is received by the Board must be not less than 150 metres.

(5) Subsection (1) does not apply with respect to neighbours who are confined feeding operations and who all agree in writing to waive the requirement for a minimum distance separation determination.

(6) Subsections (1) and (4) do not apply if the residence that may be affected is owned or under the control of the owner or operator of the proposed operation or facility.

(7) A confined feeding operation that is under the control of a single owner or operator, as determined by an approval officer or the Board, with manure storage facilities or manure collection areas that are located on adjacent land parcels are one operation for the purposes of determining the minimum distance separation.

(8) A manure composting site associated with a confined feeding operation is a manure storage facility for the purposes of determining the minimum distance separation of the operation.

(9) The owner or operator of a confined feeding operation who holds an approval or registration for the operation must locate the operation in accordance with the minimum distance separation determined for the date the application for the approval or registration was received by the Board.

(10) The owner or operator of a manure storage facility who holds an authorization for the facility must locate the facility in accordance with

the minimum distance separation determined for the date the application for the operation was received by the Board.

(11) The owner or operator referred to in subsection (9) or (10) may carry on the confined feeding operation or manure storage facility in accordance with the minimum distance separation determined for the date the application was received by the Board.

Manure Storage

Seasonal feeding and bedding sites

4(1) The owner or operator of a seasonal feeding or bedding site must locate the site 30 metres or more from a common body of water.

(2) Subsection (1) does not apply to a seasonal feeding or bedding site if the owner or operator

(a) constructs an interceptor between the site and the common body of water that diverts runoff away from that common body of water, or

(b) removes manure and bedding that accumulates at the site to an appropriate manure storage facility before runoff occurs from the site.

Short term solid manure storage

5(1) In this section, "short term" means an accumulated total of not more than 6 months over a period of 3 years.

(2) A person who stores solid manure for a short term, because of climatic or seasonal constraints, in a particular location is not considered to be the owner or operator of a manure storage facility because of that storage.

(3) A person to whom subsection (2) refers must store the manure not less than 150 metres from the nearest residence that is not owned or under the control of the owner or operator of the storage area.

(4) Subsection (2) does not apply to a person who stores solid manure on a feedlot or in a livestock corral.

(5) Sections 7(1) and 8 apply to the solid manure stored under subsection (2).

(6) A short term solid manure storage site must be located at least one metre above the water table.

Surface water control systems

6(1) The owner or operator of a confined feeding operation or manure storage facility must construct a surface water control system for the operation or facility.

Bengston v. Alberta (Natural Resources Conservation Board), 2003 ABCA 173

Date: 20030529
Docket: 0303-0014-AC

IN THE COURT OF APPEAL OF ALBERTA

REASONS FOR DECISION OF
THE HONOURABLE MADAM JUSTICE RUSSELL

IN THE MATTER OF PART 2 AND SECTION 27 OF THE *AGRICULTURAL OPERATION PRACTICES ACT*, R.S.A. 2000, C. A-7, AS AMENDED;

AND IN THE MATTER OF THE DECISION OF THE NATURAL RESOURCES CONSERVATION BOARD DATED DECEMBER 20, 2002.

BETWEEN:

GARNET R. BENGSTON, BRUCE A. BENGSTON, LORI E. FIPKE, LAWRENCE H. FIPKE, CHRISTOPHER N. ROSSITER, ERNEST L. MICIAK, ROCKYLANE C. HORNUNG, GERALDINE M. CHRISTMAN, ARNOLD R. GREENWOOD, CARIANN E. DAVISON, ROBERT E. MULLER, STAN J. CARLSON, CLIFFORD H. GRAVILLE, THE SOCIETY FOR THE PRESERVATION OF MUSKEG CREEK

Applicants

- and -

THE NATURAL RESOURCES CONSERVATION BOARD

Respondent

- and -

JAN VAN HAAREN

Not a Party to the Appeal

- and -

THE COUNTY OF WETASKIWIN

Not a Party to the Appeal

APPLICATION FOR LEAVE TO APPEAL

COUNSEL:

N.A. JEWELL
For the Applicants

W.Y. KENNEDY
For the Respondent

T.D. MARRIOTT
For The County of Wetaskiwin, Not a Party to the Appeal (no appearance)

Jan van Haaren, Not a Party to the Appeal (no appearance)

REASONS FOR DECISION OF
THE HONOURABLE MADAM JUSTICE RUSSELL

[1] In a decision dated December 20, 2002, the Natural Resources Conservation Board (the "Board") denied a request of the County of Wetaskiwin (the "County") to review a decision granting Jan van Haaren ("van Haaren") a registration to develop a confined feeding operation ("CFO") involving a 240 sow farrow-to-finish facility. Neither the County nor van Haaren are parties to this application. Rather, this is an application by owners of properties in the vicinity of the proposed facility for leave to appeal the Board's decision, even though none of them were parties in the proceedings before the Board.

[2] The applicant Ernest L. Miciak ("Miciak") deposes that the proposed development will adversely affect the operation of a commercial retreat and campground on his land which is within the prescribed minimum distance separation ("MDS") from the proposed CFO. The applicants Garnet R. Bengston, Bruce A. Bengston ("Bengston"), Lori E. Fipke ("Fipke"), Lawrence H. Fipke and Christopher R. Rossiter own land adjacent to the proposed facility but outside the MDS. The other applicants reside within two miles of the proposed site. All of the applicants are members of the Society for the Preservation of Muskeg Creek (the "Society"), which was incorporated on January 10, 2003 with objects to protect and preserve the watershed of a creek near the proposed site.

[3] The proposed grounds for appeal are that the Board erred in law or in jurisdiction in:

> (a) disregarding the County's notice that the registration would not comply with MDS requirements in Schedule 1 of the ***Standards and Administration Regulation***, Alta. Reg. 267/2001 (the "*Standards Regulation*");
>
> (b) granting registration even though van Haaren's application did not contain a nutrient management plan and determination of the land base as required by the ***Board Administrative Procedures Regulation***, Alta. Reg. 268/2001 (the "*Board Regulation*"); and
>
> (c) granting registration without requiring van Haaren to install a system of secondary containment of liquid manure in accordance with the *Standards Regulation.*

Background

[4] Miciak and his wife established the retreat on their property adjacent to the site in question in the summer of 2001. Miciak did not file an application for a permit to develop that retreat until September 6, 2002, and submitted the requisite fee in the form of a post-dated cheque dated September 30, 2002.

[5] In June 2002 van Haaren first applied to the Board to register the CFO. That application was withdrawn and in substitution the first of a two-part application was filed with the Board on September 20, 2002. That document, which is entitled "Disclosure", states in part:

> ... The Disclosure portion of the Application allows the applicant to register notice of their intent to submit an application to the NRCB as outlined in the Agricultural Operation Practices Act. The applicant will have up to six months from the date the Application Disclosure is received by the NRCB to file a completed application. Failure to meet this time line could render the applicant's Disclosure null and void. This Application Disclosure will serve the purpose of setting the date on which the minimum distance separation (MDS) is determined. ...

[6] Although the Disclosure provides a "Legal Land Description Where Development Is To Be Located", it does not describe the proposed site of the development on the land in question. Nor does the form for the Disclosure require that detail. In a letter dated September 20, 2002, the Board's approval officer sent a copy of the Disclosure to the County and advised that September 20, 2002 was considered the date of receipt of the "application" and would be used to determine the MDS. The second part of van Haaren's application was filed on October 8, 2002 and was deemed complete by the approval officer on October 10, 2002. On October 28, 2002 the County sent a letter to the Board opposing van Haaren's application.

[7] On November 6, 2002 the County approved the Miciak application for a development permit and advised him that his application was complete as of September 30, 2002. While the County did not explain the rationale for selecting that date, I infer it was because the requisite fee was submitted on that date. The County also notified Miciak that the Board had received an application for a CFO and manure storage facility, and intended to use the date of September 20, 2002 to determine the MDS, which might affect Miciak's ability to develop his parcel in the future.

[8] On November 7, 2002 the County advised the Board that it had approved, or was in the process of approving, developments which could potentially affect the MDS requirements involving van Haaren's application. On November 8, 2002 the County again wrote to the Board advising that the Miciak application should be considered under category 2 of the *Standards Regulation* for the purpose of determining the MDS. That category would require an MDS of 666 metres, which would encompass the van Haaren property and potentially preclude the CFO.

[9] On November 18, 2002 the van Haaren application for registration to construct and operate the CFO was approved by the Board's approval officer, without requiring that he submit a nutrient management plan described in ss. 3(1)(i) and 4(4) of the *Board Regulation*. Nor did the approval officer or Board require that van Haaren install a secondary containment for liquid manure pursuant to s. 11(2) of the *Standards Regulation*.

[10] On November 28, 2002 the County applied to the Board to review the decision to approve the van Haaren registration. That application was denied on December 20, 2002. In its decision, the Board calculated and applied the MDS as of the date of September 20, 2002, when the first part of the van Haaren application was filed. It declined to consider any applications for residential development filed after that date, and noted that the Miciak application for a development permit was filed on September 30, 2002. Further, it held that the Fipke application for a development permit concerned construction of a residence outside the required MDS, and that the Bengston subdivision application could be satisfied by a requirement that the earthen manure facility be moved a couple of metres. Finally, it concluded that the land use designation must reflect the land use at the time the van Haaren application was filed, at which time the complete Miciak application had not been filed. While the Board acknowledged that a CFO may affect land use decisions, in its view it was not appropriate to characterize such effect as "sterilizing" further development of adjacent lands.

[11] The applicants maintain that the Board's legislative interpretation is not harmonious with the purpose of the legislation and fails to provide certainty for either the producer or the rural community.

Test for Leave

[12] Section 27 of the ***Agricultural Operations Practices Act***, R.S.A. 2000, c. A-7 (the "AOPA") provides:

> 27(1) Subject to subsection (3), an appeal lies from a decision of the Board under section 25 to the Court of Appeal only on a question of jurisdiction or on a question of law.
> (2) An application for leave to appeal pursuant to subsection (1) must be filed and served within 30 days after the decision of the Board is made.
> (3) Leave to appeal must be obtained from a judge of the Court of Appeal within one month after the application for leave being filed and served under subsection (2).

[13] The AOPA was substantially amended by the *Agricultural Operation Practices Amendment Act*, S.A. 2001, c. 16, at which time the section permitting appeals was added. There are as yet no reported cases concerning the test for leave under it. However, its leave provisions are similar to those relating to decisions of the Energy and Utilities Board under s. 26 of the ***Alberta Energy and Utilities Board Act***, R.S.A. 2000, c. A-17. The test for leave to appeal under that Act "is whether, having regard to the standard of review, the issues engaged raise serious arguable points of law ... To determine whether the test is satisfied, regard must be had to the merits of the appeal, but the test does not require an ultimate determination of the merits": ***Atco Electric Ltd. v. Alberta (Energy and Utilities Board)***, 2002 ABCA 245 at paras. 6 and 7.

[14] Given the similarity of the legislative schemes, I will apply that same test in this case. The determination of whether there are serious arguable points of law will be governed by the merits of the appeal, bearing in mind the curial deference that might be shown if leave is granted, having regard to the legislative purpose, nature of the problem, and expertise of the Board. For the purpose of this application, I assume that the decision of the Board relating to what I consider an interpretation of its governing legislation will be measured on the standard of reasonableness: ***Nycan Energy Corp. v. Alberta Energy and Utilities Board*** (2001), 277 A.R. 391 at 394, 2001 ABCA 31 at para. 4.

Standing

[15] Section 21(1) of AOPA requires notification of affected municipalities of applications for registration, and s. 21(2) provides:

> 21(2) The only directly affected parties of an application under subsection (1) are the applicant and the municipalities that are affected persons.

Sections 19 and 20 of the Act, which govern applications for approval, establish a scheme whereby any person may apply to be designated under that section as a directly affected party. However, ss. 21 and 22, which govern applications for registration, do not invoke a similar scheme.

[16] The distinction between applications for approval and for registration is wholly related to the number of animals of particular categories of livestock that will be allowed in a confined feeding operation. Those numbers are governed by Schedule 2 of the ***Agricultural Operations, Part 2 Matters Regulation***, Alta. Reg. 257/2001.

[17] The rationale for omitting a scheme whereby persons could be designated as directly affected persons with respect to applications for registration is apparently based on the supposition that smaller operations will not have the same impact on neighbours as larger operations. However, counsel for the Board fairly conceded that the demarcation, in terms of prescribing the number of animals to be involved in an operation before anyone may apply to be designated as a person directly affected by that operation, was entirely arbitrary.

[18] As van Haaren's application for registration is related to a smaller operation, the Board argues that the only parties to the Board's decision are van Haaren and the County, and consequently they are the only parties with *locus standi* to seek leave to appeal. Put simply, if the legislation does not allow the applicants to participate directly in the Board's registration application process, they should not be permitted to participate in an appeal.

[19] The applicants submit that they qualify as "aggrieved parties" under the common law test. They cite the decision of ***Civil Service Assn. of Alberta v. Farran*** (1976), 68 D.L.R. (3d)

338 at 341, [1976] A.J. No. 357 at para. 13 and 15 (QL) (Alta. S.C.A.D.) ("***Farran***"), where persons aggrieved were noted to be those who "have a peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public" or "who have a real interest in the decision". Here, Miciak claims to be aggrieved because his business will be adversely affected if the CFO is allowed in contravention of the proper MDS. Other applicants are said to be aggrieved because they rely on a creek in the vicinity for recreation purposes, which may be contaminated due to its proximity to the CFO.

[20] However, the Board notes that in ***Farran***, both Sinclair and Haddad JJ.A. emphasized that they granted the applicant standing as an aggrieved party only because of an allegation of bias, which provided it with a special interest not shared by the general public. In this case, with the exception of Miciak, there is nothing unique in the circumstances, other than proximity, to establish a comparable special interest with respect to the applicants which would distinguish them from other members of the public.

[21] Although the applicant Society was established on January 10, 2003 to "protect and preserve, as far as possible, the watershed of Muskeg Creek" and presumably to assert the applicants' reliance on the creek for recreation and enjoyment, there was no evidence before the Board to that effect. The only evidence before me is a statement in Miciak's affidavit that van Haaren's application "will cause irreparable harm to my business and to Muskeg Creek".

[22] Absent evidence of environmental or other damage to the creek as a result of the CFO, and without evidence that the applicants have unique or exclusive access to the creek which makes their grievance different from that shared by the rest of the public, I do not consider them to have standing as aggrieved parties on the basis of reduced enjoyment of the creek.

[23] All of the applicants assert alternatively that they have public interest standing on the basis that the issues are justiciable and serious, that they have a genuine interest in the case, and that there are no other means to address the Court: ***Urban Development Institute v. Rocky View (Municipal District No. 44)*** (2002), [2003] 2 W.W.R. 140 at 150, 2002 ABQB 651 at para. 33 ("***Urban Development Institute***"). They rely on ***Friends of the Old Man River Society v. Assn. of Professional Engineers*** (1997), 208 A.R. 28 at para. 69, 55 Alta. L.R. (3d) 373 at 401-2 (Q.B.), rev'd on other grounds (2001), 277 A.R. 378, 93 Alta. L.R. (3d) 27 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 366 (QL), to support their position that a justiciable and serious issue arises when a statutory body acts in a way which may exceed its jurisdiction. They further argue that a matter is justiciable if "it has a sufficient legal component to warrant the intervention of the judicial branch": ***Reference Re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525 at para. 26, 83 D.L.R. (4th) 297 at 310.

[24] The applicants claim that they have a genuine interest in the proceedings as citizens, that there are no better persons than themselves to bring the issues before the Court, and that the

interpretation of the statute will have significant impact on rights of landowners throughout Alberta.

[25] In response, the Board argues that in ***Reese v. Alberta (Minister of Forestry, Lands and Wildlife)*** (1992), 123 A.R. 241, 85 Alta. L.R. (2d) 153 (Q.B.), McDonald J. found that the applicants had public interest standing primarily because there was no directly affected party. However, in this case, the County is an affected party that could challenge the Board's decision, but has not seen fit to do so. Further, the Board argues that although Kenny J. granted public interest standing to an umbrella group in ***Urban Development Institute***, *supra,* she did so only because it represented parties who were directly affected by the outcome. Moreover, she held that the applicant had a genuine interest as a citizen in ascertaining the rights and obligation of the parties in the future. In the absence of any status of any of its members as directly affected parties, the Board argues that the applicant Society does not merit standing.

[26] In this case, the public's interest might be better represented by the County, which is a public body, than by private individuals. But while the County conveyed concerns of interested citizens to the Board during the initial application and request for review of the Board's decision, it expressly indicated that it did not share those concerns, and it has not chosen to be party to a further appeal.

[27] However, even assuming without deciding that the County is not better able to represent the public interest in these circumstances, it is necessary to consider whether the applicant Miciak has standing to challenge the Board's decision as an aggrieved party, and as such, represent the public interest. If so, it may not be necessary to grant standing to the other applicants on the basis that the matter could not otherwise be addressed.

[28] I agree that the position of Miciak is unique. Even though he had not obtained the necessary permit to do so, it is not disputed that he was already operating a commercial retreat on his land which could be adversely affected by the CFO. While he is not a "directly affected party" under s. 21(2) of the AOPA for the purpose of participating in an application for a registration before the Board, this does not preclude him from obtaining standing on an alternate basis for the purpose of judicial review: ***Alberta v. Canadian Wheat Board*** (1997), [1998] 2 F.C. 156 at para. 26, 2 Admin. L.R. (3d) 187 at 197 (T.D.), aff'd (1998), 234 N.R. 74, 13 Admin. L.R. (3d) 4 (C.A.); ***Friends of the Island Inc. v. Canada (Minister of Public Works)***, [1993] 2 F.C. 229 at para. 80, 102 D.L.R. (4th) 696 at 736-7 (T.D.), varied on other grounds (1995), 191 N.R. 241, 131 D.L.R. (4th) 285 (F.C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 80 (Q.L.). Given his special grievance as a result of his operation of a retreat in proximity to the CFO, I conclude that he has standing to seek leave to appeal the Board's decision.

[29] Further, because he shares the same concerns as the other applicants, in addition to his own special concerns, I am satisfied that he is able to represent those other concerns as well. Thus, I deny the other applicants standing.

Proposed Grounds of Appeal

(a) Failing to ensure compliance with MDS requirements

[30] Section 3(1) of the *Standards Regulation, supra,* provides:

> 3(1) An approval officer and the Board must not issue an approval or registration for a confined feeding operation or an authorization for a manure storage facility unless the minimum distance separation for the operation or facility on the date the application is received by the Board complies with this section.

The interpretation of a bylaw is a question of law: ***500630 Alberta Ltd. v. Sandy Beach (Summer Village)*** (1996), 181 A.R. 154 at para. 10, 31 M.P.L.R. (2d) 306 at 309 (C.A.). So too is the interpretation of a Regulation.

[31] The applicants argue that the Board should have interpreted the phrase "the date the application is received by the board" within the *Standards Regulation* to mean that the MDS requirement was only triggered when the application was complete. However, the Regulation prescribes a scheme whereby the date on which the application is received by the Board is the date on which the relevant development must meet the required MDS. The intent of that section is to provide certainty.

[32] The impugned clause in this Regulation is not analogous to the clause at issue in ***Love v. Flagstaff (County of) Subdivision and Development Appeal Board*** (2002), 8 Alta. L.R. (4th) 52, 2002 ABCA 292. There, s. 6.1.7.3 of the Flagstaff County Land Use Bylaw No. 03/00 provided:

> 6.1.7.3 For the siting of a dwelling in close proximity to an intensive animal operation (existing or <u>proposed</u>), if a permitted use, must be located at least the minimum distance prescribed in the Code of Practice [emphasis added].

The issue in that case turned on the reference to the word "proposed", which governed the relevant date for deciding whether a residential permitted use was situated the required distance from an intensive livestock operation. The question was whether it was the date of filing the application or some later date.

[33] But in this case, the *Standards Regulation* governs and it is precise. Section 3(1) clearly prescribes the relevant date as"the date the application is received by the Board". The intent of that section is reflected in a"Guide to the Application and Approval Process" published by the Board, which states at page 3:

> ... The date at which the MDS is established will be the day that the producer submits a complete Application Disclosure (Part 1 of the application form).

Moreover, s. 18(2) of the AOPA provides the approval officer with discretion to determine whether an application is complete. Here, the approval officer deemed that the van Haaren application was complete on September 20, 2002.

[34] Although the second part of the application requires the production of technical information including the design for the facility, it appears that none of that information is necessary to calculate the MDS. Instead, the MDS is calculated based on the information contained in the Disclosure document in accordance with a formula prescribed in Schedule 1 of the *Standards Regulation* and tables prescribing recommended MDS.

[35] Given the clarity of the Regulation with respect to the date and means for determining the MDS, and having regard to the standard of review, I am not persuaded that this issue raises a serious arguable point of law to be tried in the proposed appeal.

(b) Failure to require a nutrient management plan and determination of land base

[36] Section 3(1)(i) of the *Board Regulation, supra,* provides:

> 3(1) An application for a registration or an amendment of a registration must be filed with the Board and contain the following
>
> ...
>
> (i) a nutrient management plan as described in section 4(4).

Section 4(4) provides:

> 4(4) An application for an authorization for a nutrient management plan must be filed with the Board and contain a detailed description of how the nutrient management plan will provide the equivalent or greater protection to the water and soil than would be achieved by compliance with sections 24 and 25 of the Standards and Administration Regulation under the Act.

Section 24 of the *Standards Regulation* prescribes manure application limits and s. 25 does not apply before January 1, 2005. Section 26 of the Regulation provides:

> 26 Despite sections 24 and 25, the Board may authorize a person to apply manure to land in accordance with a nutrient management plan proposed by the person if the Board is satisfied that following the nutrient management plan will provide the equivalent or greater protection to the water and the soil.

[37] The Board maintains that s. 26 is intended to allow an operator to obtain relief from the provisions of ss. 24 and 25 where there is a land and crop management regime that would accommodate the necessary environmental protection. The Board argues that s. 26 is not applicable here, as van Haaren's proposal met the requirements of s. 24.

[38] The decision of the approval officer indicates that as part of his application van Haaren did submit a proposal to spread manure. In his application, van Haaren opted to calculate the application of manure based on the acreage tables under Schedule 3 of the *Standards Regulation*, rather than on a nutrient management plan. The approval officer determined that the operation would require a land base of 340 acres and that van Haaren had secured a land base of 498 acres.

[39] As the Board did determine the nutrient management requirements, finding the required land base to be less than the secured land base, it cannot be seriously argued that the Board failed to correctly apply that criterion in evaluating the application.

(c) Failure to require a secondary manure catch basin

[40] Section 11(2) of the *Standards Regulation* provides:

> 11(2) In addition to the requirements of subsection (1), the owner or operator of an open liquid manure storage facility must provide a system of secondary containment of the liquid manure if there is a reasonable possibility that liquid manure can be discharged into a common body of water.

[41] The applicants contend that the approval officer failed to properly apply the "reasonable possibility" test and that the Board received ample evidence of the risk of contamination to Muskeg Creek, but insufficient evidence to the contrary. In response, the Board argues that if the phrase "reasonable possibility" engages an issue of law, it is one which is impregnated with findings of fact.

[42] I note that as part of his application, van Haaren submitted a report setting out soil and groundwater conditions in relation to the proposed site. The company that conducted the geotechnical investigation indicated that separation distances for the barns and lagoon base from groundwater table and top-of-bedrock were acceptable. The approval officer concluded that secondary containment of liquid manure was not necessary, noting that the storage facility was 400 metres from Muskeg Creek and that the proposed storage was "mostly below existing grade".

[43] In granting the registration, the Board required van Haaren to adhere to construction recommendations made by the geotechnical company as well as other conditions relating to the construction of the concrete manure storage facility and liquid earthen storage facility. Additional requirements of the Board were the installation of monitoring wells to detect contaminants and periodic reporting of the results.

[44] In these circumstances, it cannot be seriously argued that the approval officer or Board neglected to review evidence or to consider the possibility of manure discharging into a common body of water. Accordingly, the failure to require a system of secondary containment of liquid manure does not raise a serious arguable question of law.

Conclusion

[45] In the result, although I would grant Miciak standing to appeal, I deny leave to appeal on each of the three grounds of appeal.

APPLICATION HEARD on MARCH 25 and MAY 6, 2003

DECISION FILED at EDMONTON, Alberta,
this 29th day of MAY, 2003

RUSSELL J.A.

NRCB | Natural Resources Conservation Board

NATURAL RESOURCES CONSERVATION BOARD

2020-21 ANNUAL REPORT

APPLICATIONS

In 2020-21, the NRCB received 119 permit applications for confined feeding operations. These included approvals (permits for larger operations), registrations (permits for smaller operations), and authorizations (permits for manure storage facilities where there is no change in livestock numbers). The number of completed applications received in 2020-21 was essentially unchanged over the previous year with 116 applications deemed technically complete in 2019-20 and 117 in 2020-21.

The NRCB aims for efficiency in issuing all permit decisions with a goal to issue 85 per cent of decisions within 65 working days of the date at which the application is deemed to be complete. In 2020-21, the NRCB exceeded this goal with 93.5 per cent of decisions issued within 65 working days. While a few decisions took longer to process, most applications were processed and decisions issued well within the target.

AVERAGE NUMBER OF DAYS TO DECISION, 2020-21

Permit type	Average number of days to decision[1]	Number of decisions issued[2]
Approvals	53	63
Registrations	43	6
Authorizations	33	41

Efficiency in permitting decisions

The NRCB exceeded its performance target in 2020-21, issuing 93.5% of permit decisions within 65 working days.

1. The NRCB counts days to decision from the date the application is technically complete.
1. The number of decisions in this table does not include approval officer amendment decisions under Section 23 of AOPA (5 in total for this period).

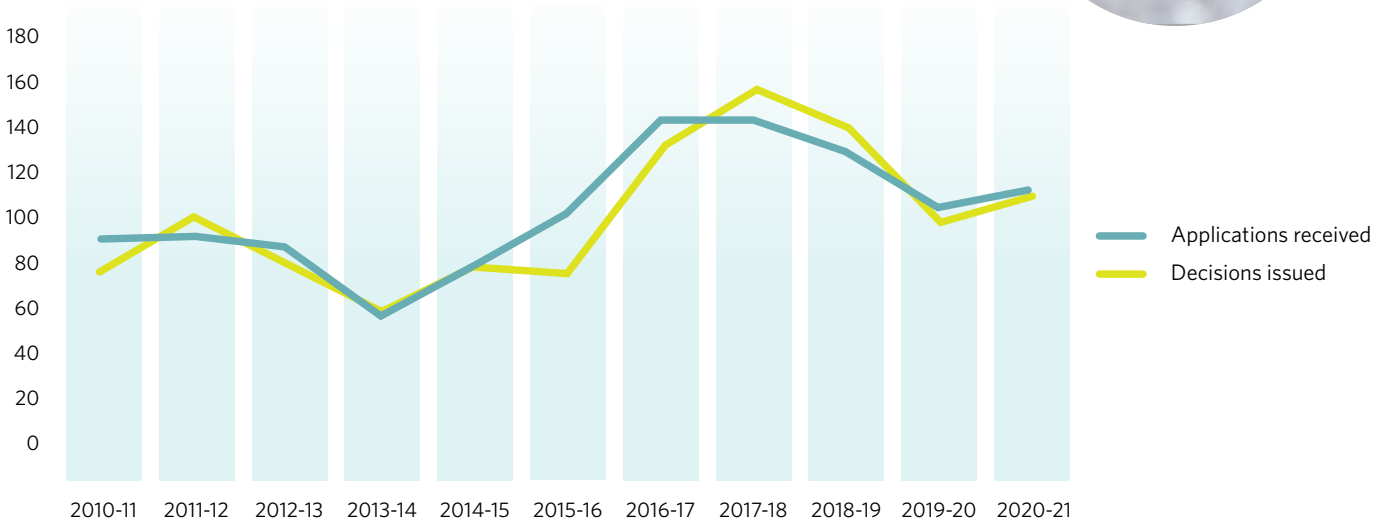
Most applications were received from operators in the central and southern regions of the province. The poultry, cattle, and dairy sectors were the source of the majority of all applications.

TECHNICALLY COMPLETE APPLICATIONS RECEIVED AND DECISIONS ISSUED, BY REGION, 2020-21

Region	Technically complete applications received	Decisions issued[1]
Peace	1	1
North Central	13	16
Central	52	54
South	51	44
TOTAL	**117**	**115**

1. The number of decisions issued in a given year may not match the number of completed applications as some applications may carry over from the previous year.

HISTORICAL TREND OF COMPLETED APPLICATIONS RECEIVED AND DECISIONS ISSUED



TECHNICALLY COMPLETE APPLICATIONS BY LIVESTOCK CATEGORY, 2020-21

Livestock category	Completed applications[1]
Beef	26
Dairy	17
Goats	1
Poultry	18
Sheep	3
Swine	4

1. An application is counted once for each animal type in the application.