

The Impact of AOPA (Agricultural Operation Practices Act) on Dairy Farm Expansion

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■ Take Home Messages

- ▶ make sure you understand the AOPA approval process and how it works before you apply for an approval;
- ▶ be proactive within the approval process and recognize that the regulator expects the producer to defend his or her project;
- ▶ engage your neighbours, provide them with accurate information and be responsive to their questions and input;
- ▶ if there is media attention and misinformation in the media about your project, communicate with the media to get your side of the story and the correct information into the media;
- ▶ be proactive in the early stages of any appeals as this can save significant time, money and uncertainty; and
- ▶ avoid linking an AOPA approval application with a water license application under the Water Act.

■ Introduction

Alberta producers seeking to expand their existing dairy farm or locate a new dairy are required to obtain an approval under Alberta's *Agricultural Operation Practices Act* (AOPA).

This paper explains how the AOPA process works and provides guidance for producers to successfully navigate the regulatory approval framework. In addition, this paper discusses common problem areas and provides strategies on how to overcome them.

■ What is AOPA

AOPA became law in Alberta in 2001. Prior to 2001, Alberta municipalities had primary jurisdiction to approve dairy operations. Under the AOPA, a livestock operation is referred to as a Confined Feeding Operation (CFO). AOPA sets out the technical and environmental standards for CFOs. AOPA designates the Natural Resources Conversation Board (NRCB) as the lead agency for approval and compliance activities for all large-scale livestock operations in Alberta.

The goal of AOPA is to provide a consistent framework across the province that will facilitate the timely approval and monitoring of CFOs.

■ How to Obtain an Approval

The first step in a gaining an approval is to file a Part I application with your regional office of the NRCB. A Part I application is an important component of the approval process because it allows a producer to preserve the setback requirements from neighboring residences.

Under AOPA, any new or expanding dairy is required to maintain a minimum separation distance (MDS) from nearby residences. The calculation of the MDS is set out in a formula in the regulations.

Tip ► Carefully select the location for your proposed barn. Make sure you can meet the Minimum Distance Separation (MDS) requirements.

In the past, under the municipal system of approvals, producers had to issue a public notice that they were applying for a new or expanded dairy. There were instances where neighbouring landowners opposed to the dairy would immediately apply for a development permit to locate a residence within the MDS of the proposed dairy. The neighbour's actions of siting a potential residence within the MDS meant that the producer could not go ahead with his project.

AOPA addresses this problem by allowing producers to file a Part 1 application to lock in the MDS. This means that if a neighbour applies for a development permit for a residence within your MDS zone after you have filed your Part 1, the proposed residence will not be included in the MDS assessment.

■ Part I Application

The Part 1 application is a simple form that contains minimal information with respect to the applicant and the project. Once the Part 1 application has been filed, the producer then needs to conduct the site assessment and engineering work in support of the Part 2 application.

■ Part II Application

The Part 2 application form requires a producer to provide detailed information relating to:

- a site plan and layout for the barn and any related infrastructure;
- the land base for manure application, soil type, and topography;
- separation distance from water courses, water bodies, and water wells;
- groundwater and geological information; and
- details relating to manure storage, handling and runoff control.

Once the approval officer at the NRCB determines that you have provided all of the required information, a public notice is published in local newspapers and a letter is sent to potentially affected parties. Anyone who is potentially affected by the CFO and who has concerns is given a limited number of days to file a 'statement of concern' with the NRCB. The application information is also provided to referral agencies including the local municipality, Alberta Environment, Alberta Transportation, and the regional health authority.

■ Statements of Concern

The NRCB provides copies of any statements of concern and responses from referral agencies to the producer. The approval officer is expected to identify for the producer those concerns raised that are relevant and requiring a response. The producer is invited to respond to the statements of concern and comments from the referral agencies. It is important that producers respond to statements of concern and correct any inaccurate information.

Tip ► Always provide the NRCB with a written response to any statements of concern filed against your project. If someone says something inaccurate about your project, make sure the NRCB understands why it is inaccurate. Provide the NRCB with the correct information.

After the approval officer has received your response to any statements of concern, the approval officer will perform a detailed review of all of the information.

■ Determining ‘Directing Affected’ Parties

AOPA was designed to help reduce the controversy that can arise when someone wants to site a new or expanded barn. Under the previous municipal system, anyone who was opposed to a proposed barn had legal standing in the process. It did not matter how far away the person was from the proposed barn, they had the same rights as those who were close by.

As a result, AOPA seeks to narrow those who have legal standing in the process to people who may be affected and then AOPA goes on to require those people who fall within the ‘affected’ category to demonstrate why they believe they are ‘directly affected’.

The Act grants ‘affected’ party status to anyone who:

Affected party

5 Unless specified otherwise in the Act, for the purposes of Part 2 of the Act an affected party is

- (a) in the case of any part of a confined feeding operation that is located or is to be located within 100 metres of the bank of a river or stream or of a canal, a person or municipality that is entitled, under the Water Act, to divert water from the river, stream or canal within 10 miles downstream, as measured along the water course;
- (b) the municipality where the confined feeding operation is or is to be located;
- (c) a municipality within and a person who resides on or owns land that is within, the following distance from the boundary of a parcel of land on which the

confined feeding operation is located or is to be located:

- (i) 1/2 a mile of a confined feeding operation that contains or is to contain 500 or fewer animal units;
- (ii) one mile of a confined feeding operation that contains or is to contain 501 or more animal units but fewer than 1001 animal units;
- (iii) 1.5 miles of a confined feeding operation that contains or is to contain 1001 or more animal units but fewer than 5001 animal units;
- (iv) 2 miles of a confined feeding operation that contains or is to contain 5001 or more animal units but fewer than 10 001 animal units;
- (v) 3 miles of a confined feeding operation that contains or is to contain 10 001 or more animal units but fewer than 20 001 animal units;
- (vi) 4 miles of a confined feeding operation that contains or is to contain 20 001 or more animal units.

One of the steps that the approval officer takes is to assess whether or not any of the people who have filed statements of concern meet the definition of an affected party. If the person does not meet the definition, then that person does not have standing in the process.

If the person does fall within the definition of an affected party, the approval officer then assesses the statement of concern to determine whether the affected party has demonstrated that they are 'directly affected'. That is, AOPA does not assume that all 'affected parties' are 'directly affected'. An 'affected party' must demonstrate to the approval officer that they are impacted in a direct and discernable manner by the CFO project.

■ Approval Officer Decision

Once the approval officer has assessed the status of the affected parties and has completed a review of all of the information relating to the proposed CFO, the approval officer issues a decision report. The decision report details the information the approval officer reviewed and the officer's findings. If an approval is granted, a detailed list of conditions may be attached to the approval.

The producer and affected parties will receive a copy of the decision report. Anyone who is dissatisfied with the decision has the right to request a Board review.

■ What Happens if I have Neighborhood Opposition

If you encounter opposition to your project, it is important that you proactively communicate with your neighbors and the community. Increasingly, people without an agricultural background are moving into rural areas. They often do not know what to expect from a CFO and fear the worst. Proactive communication and education can go a long way to reducing opposition.

Tip ► Communicate proactively with your neighbours and do not assume they have an understanding of your farm and impacts.

■ Board Reviews

A board review can be requested by the following parties:

- ▶ a producer who has been denied an approval or who disagrees with a condition on an approval;
- ▶ an affected party who has been denied 'directly affected' status; or
- ▶ a directly affected party who disagrees with the approval being granted.

A review is essentially an appeal of the approval officer's decision. However, no one has an automatic right of appeal. First, the party requesting the review has to provide written reasons as to why that person believes that the approval officer made an error. The Board will review the request and, if the Board is not satisfied that the concerns raised in the review request are of merit, or if the Board believes that the approval officer properly considered the issues, then the Board will deny the review request. Conversely, if the Board is satisfied based on the allegations in the review request that the approval officer may have erred or missed something, the Board will schedule a review hearing. The review will either be a public hearing or the parties will be requested to file written submissions.

Tip ► If someone appeals your approval, try to have the appeal (review request) dismissed at the first opportunity.

■ Respond to Board Review Requests Early

If someone files a review request against your approval, it is in your interests to properly respond and get qualified advice. When you receive notice that a review request has been filed, you will be given an opportunity to file a letter with the Board setting out your response to the review request and to explain to the Board why you think that the approval officer made the correct decision. You might only be given as few as 5 days to do so. If you can persuade the Board through your letter that the approval officer's decision was proper, you can save yourself months of delays and uncertainty that will result from the full public hearing process. You can also save yourself significant legal and other expenses. The costs of convincing the Board at the first instance not to proceed with the review will be many times less expensive than having to participate in a public review hearing about your project.

Also, some producers seem to be of the impression that it is the job of the approval officer to defend his or her decision. This is not the case either in law or in practice. The approval officer will likely take no position on the review request. The approval officer will simply take the position that he or she made the decision that was made. If a party believes the decision was in error, the Board will decide. It is a producer's responsibility to defend the approval officer's decision. Producers who choose not to defend the approval decision do so at their peril.

Tip ► It is a producer's responsibility to defend an approval decision, not the approval officer's responsibility.

■ Engage the Media

If you find yourself in the midst of a controversial project where your opponents are using the news media to attack your project, it is very important that you engage the media. You need to get your side of the story into the media. If you don't tell your side of the story, if you don't correct the misinformation, no one else will. The allegations will take on an air of truth. Typically, if you provide the media with accurate information, the sensation of the story your opponents are trying to create is lost and the media will no longer cover the story. Furthermore, regulators such as the NRCB like to see a project proponent defending their project and correcting misinformation.

Tip ► If your project is being attacked or unfairly characterized in the media, engage the media with accurate information.

■ Review Hearings

If the Board grants someone a review request and directs that the matter is to go to a public review hearing, you will need to bring with you the appropriate experts to defend your position. A public review hearing of your approval is an unpleasant experience at best and one in which the Board could overturn your approval. Be prepared and organized.

■ Appeals to the Courts

If the Board upholds your approval, opponents have the right to appeal the Board's decision to the Alberta Court of Appeal. There are strict time limits for such an appeal. The appeal must be filed within 30 days of receipt of the Board's decision.

The Court also uses a two-step appeal process. The appealing party has to convince a single judge of the appeal court that their appeal has merit, a reasonable chance of success and is of importance to Albertans. If the appeal appears weak or trivial, the judge can dismiss the appeal. If, however, the judge believes there may be merit to the appeal, the judge will direct that the appeal be heard by a panel of three judges of the Court of Appeal. If the panel of judges concludes that the Board erred in granting the approval, the Court will quash the approval and direct that either the Board or the approval officer conduct the process afresh. There is no limit on the number of times that a person can be appealed and it is possible to end up at the Court of Appeal a number of times only to be sent back into the approval and appeal processes again.

In terms of timing, the first stage of the Court of Appeal process can take anywhere from two to six months. If the single judge directs a full appeal before a panel of the Court of Appeal, that process can take one to two years. Consequently, producers serve themselves well by trying to have the appeal dismissed at the first stage of it entering the court.

Similar to the process for Board reviews, the NRCB will not take an active role in defending the Board's decision at the Court of Appeal. The law and practice place the onus on the person who received the approval to defend the decision-making process. The Board will simply explain to the Court what the Board did. The Board will take the posture that if the Court thinks the Board erred, so be it.

■ What If the Municipality Does not Want My Farm or My Expansion

The provincial government has encouraged municipalities to designate areas where the municipality does not want CFO developments or expansions to occur. However, the government was mindful that depending on the composition of a municipal council, some municipalities may go too far and try to block large regions from having further CFO development. In order to address this, AOPA gives the NRCB the legal authority to override a municipal exclusion zone.

This means that if you find yourself in an area of your municipality that has been designated as a CFO exclusion zone, it does not mean that there can be no CFOs. There may be an opportunity to persuade the Board that your location is a proper and safe location for a CFO. Of course, these are delicate and sensitive matters. Proper advice and assistance should be sought in order to increase your chances of success.

■ What Other Related Approvals May be Required

In addition to requiring an approval under AOPA, you will also likely require a water license under the *Water Act*. Depending on how close you are to a primary or secondary highway, you may also need a roadside development permit from Alberta Transportation.

The NRCB process gives you the option of linking your water license application to your AOPA approval application. Producers should carefully assess the implications of this linkage before making the decision to link the water license application to the AOPA application process. Rarely will linking the two applications provide any timing or cost advantage for producers. More commonly, linking the two applications together will lead to delays, increased costs, and significant duplication in processes and appeal potential.

Tip ► Avoid linking an AOPA approval application with a water licence application under the *Water Act*.

■ Conclusion

The AOPA approval process may at first appear daunting; however, if a producer enters the process with knowledge of the approval process and follows the strategies outlined in this paper, it may assist in obtaining a successful approval for a new or expanded barn. The key is to inform

yourself at each stage of the potential pitfalls and to proactively engage the process.

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