

Regulatory Changes for Confined Feeding Operations: New Rules, New Attitude

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■ Introduction

In July of 2001, the Government of Alberta announced, effective January 01, 2002, its intention to create a provincial regulatory system for Alberta's confined feeding operations (CFOs). CFOs have been defined as fenced or enclosed areas where livestock are confined for the purpose of growing, sustaining, finishing, or breeding by means other than grazing. As a result, Alberta's hog production will now fall under this regulatory system.

The various pieces of legislation that form the backbone of this new regulatory system have been developed by Alberta Agriculture, Food and Rural Development (AAFRD). AAFRD will continue to be responsible for the Agriculture Operations Practices Act (AOPA), and the various associated regulations and standards.

Both the approval and compliance processes and requirements set out under the Act, however, will be delivered by the Natural Resources Conservation Board (NRCB). As currently envisioned, this will include receiving and reviewing applications for new or expanding CFOs, providing a public hearing when unresolved concerns remain, and ensuring that there is ongoing compliance with the conditions contained within any approvals issued.

Until the recent expansion of its mandate, the NRCB did not have a post-approval regulatory function, and so the Board has been working to develop the processes needed to deliver an effective regulatory system for CFOs. This paper will examine some of the principles that the NRCB proposes to follow in developing this regulatory system.

■ Exiting Processes

Until the new legislation was put in place, provincial regulation of CFOs was quite limited. While AAFRD had created Codes of Practice that set out a number of guidelines for operators, these were not enforceable. Operators generally also required a Water License from Alberta Environment (AENV) for the use of water, but these do not set out operating criteria for the facility. Operators are responsible for meeting the general environmental requirements set out under AENV's legislation, primarily the Environment Protection and Enhancement Act (EPEA), but no approvals are issued under this legislation and the response from AENV as a result is generally reactive (i.e., to a problem) rather than proactive.

The primary regulatory function for CFOs was conducted at the local level through development permits issued by the relevant County or Municipal District. These approvals often contained additional conditions, but the extent and content of these varied between municipalities. In recent years there have been a number of proposals made to the municipalities for new or expanding CFOs that have engendered a significant amount of controversy, and their decisions have on several occasions been challenged in the Courts.

In discussions with local governments, the province has indicated that it found that while many municipalities felt quite capable of handling the siting of these facilities, particularly given their intimate knowledge of local conditions and planning requirements, they were less comfortable with their ability to monitor and enforce the conditions that were placed in their approvals, citing both lack of resources and the needed technical expertise. Addressing the changing nature of these operations, particularly the combination of increasing density and facility size, appears to have been of particular concern to at least some of the municipalities.

At the same time, producers began to indicate concerns that, with the recent growth in their industry, local approvals were potentially creating inconsistencies in how the industry was treated across the province. There was also a general concern around what they perceived as uncertainties with the approval process, particularly in the time required to receive approval.

Public concerns were also being raised, particularly in the wake of Walkerton, that in the absence of enforceable provincial standards there was insufficient control of the environmental and social impacts of these facilities. A common issue was how to address the broader planning aspects of these developments as multiple land uses came into conflict.

■ Regulatory Principles

The NRCB is a quasi-judicial body and so its regulatory approach is to a large degree proscribed by common law as well as its enabling legislation. Fundamentally, the NRCB is required to examine the economic, environmental, and social costs and benefits of each project and determine whether the approval of the project would be in the public interest. However, the term “public interest” is generally left undefined. Since exploring this topic could easily be the subject of a separate paper, it is not addressed in detail here. However, it is possible to set some basic principles that the NRCB believes will act as guides in the development of the appropriate regulatory system for CFOs.

There are three basic principles that are likely to be key elements in defining the public interest.

First, the maintenance of a strong and stable economy is clearly in the interest of all Albertans. Furthermore, the agricultural industry has been, and has the potential to remain, one of the cornerstones of the province's economy. Therefore, an economically successful agricultural industry is in the public interest.

Second, the protection of the public interest requires that all industry, including agriculture, be carried out in a manner that is sustainable. The environment must be protected sufficiently that no unacceptable degradation of air, soil, or water quality occurs either now or in the future. Nor should any industry have unacceptable effects on other environmental parameters such as biodiversity.

Finally, the public interest includes a basic right to the use and enjoyment of one's own property. Any activity that is undertaken, either individually or collectively, cannot be carried out in such a way as to unfairly reduce that right. While society may make decisions that add to the broader public good at some cost to individuals (one has only to look at the siting of a large new road), these decisions cannot be made in a manner that does not respect individual rights.

The balancing of these three principles underlies all of the work that the Board has done in the design and delivery of the proposed regulatory system. The NRCB also strongly believes that an efficient regulatory system is required by our mandate and is a key goal, since regulatory effectiveness contributes directly to the economic success of the industry, the protection of the environment, and the protection of the rights of other affected parties.

■ Key Elements

The regulatory system for CFOs contains three separate, albeit linked processes—the preparation of applications, the review of those applications, and inspections of approved facilities. Set out below is a description of some of the key elements that the NRCB has considered in the design of each of these.

The Board firmly believes that any regulatory system, to be effective, much be subject to ongoing review, preferably within prescribed timelines. Therefore, the NRCB also intends to continue to discuss these processes with all of its stakeholders to ensure that they continue to protect the public interest in the most efficient manner possible.

Applications

Any producer wishing to either expand an existing CFO or build a new facility is required to submit an application to the NRCB. Because few producers will live in proximity to large urban centers, it is important, if the system is to be efficient, that services can be delivered at the local level. Equally important will be the ability of the producers to work directly with the parties responsible for deciding on their applications.

To accomplish this, four regional NRCB offices have been established. Applications will be received at these offices, and the bulk of the review process will be carried out there, as will the decision to approve or deny the application. The NRCB intends to monitor regional activity levels and has committed to adjust its regional presence as required.

In designing the application system, the NRCB has also taken into account the fact that while a few producers may eventually submit a number of applications, the vast majority will submit very few. Therefore, there is little opportunity for producers to become familiar with the application process.

Since there is no public benefit to either making the application process difficult or in creating an environment where incomplete or inadequate applications are submitted for review, the Board intends to provide detailed descriptions of its expectations and to play an active role in assisting producers in the preparation of their applications, including the identification of deficiencies.

This close relationship between the party submitting an application and the decision maker examining that application can of course create a concern regarding the “rigour” that may be applied to the eventual review of a completed application. The NRCB’s review process, discussed below, has been adjusted to address this concern but, if this relationship ultimately creates uncertainty for

producers (and thereby reduces process efficiency), the application process will be revised accordingly.

Reviews

A fundamental requirement of the NRCB's review process is that sufficient opportunity must be provided to potentially affected parties for them to understand the proposal and to provide their comments. Other key requirements include increased certainty in the decision process for applicants, including prescribed timelines as well as decision making at the local level, where presumably the understanding of local issues is greatest. Finally, where issues still remain, the NRCB process provides for a public review process where these issues can be aired, evaluated, and addressed in a fair and technically competent manner.

Effective input from local officials at the municipal level will be a key element of the review process. The NRCB intends to incorporate local planning requirements into its approvals and will directly seek input from the municipalities. Any nearby urban community that appears likely to be affected if the project is approved will be contacted as well.

In order to ensure effective public input, direct notice will normally be provided to parties that may be affected (e.g., immediate neighbours). A more general notice of the application will also be provided when it is felt warranted (e.g., for a particularly large development).

The Board is also prepared to assist in the facilitation of discussions between producers and the various affected parties. If such discussions are successful, there can be a significant improvement not only in the proposed facility and its operations, but also in long-term relationships between producers and their neighbours as well. This can lead to a great reduction in the time required to complete the regulatory process and greatly help to avoid future conflicts. Since such a result is clearly in the public interest, the NRCB intends to take an active role in these discussions and will offer its services to facilitate them whenever the parties believe that this would be beneficial.

In order to increase certainty in the process, time frames have been set for submissions of concerns to the NRCB, for the identification of parties deemed to be potentially directly affected by the application and for the issuance of decisions by the Approval Officers. All decisions issued by the Approval Officers that are contrary to the views of one of the interested parties must also be supported by written reasons. Finally, all parties to this process will have an opportunity to request a Board review of the decisions of the Approvals Officer.

If a Board review is granted, then a number of new approaches are also proposed to ensure that the process remains both fair and efficient. For example, since unlike other NRCB hearings, no intervener funding will be provided, the Board intends to ask its specialist staff to take a more active role in CFO hearings, providing direct evidence on the more complex technical issues. Other government agencies will also be expected to take a more direct role as well. The NRCB also intends to offer alternative dispute resolution mechanisms prior to a review when these appear to have a reasonable chance of success. And the Board has also set out time frames for the issuance of its own decisions resulting from these reviews.

Inspection/Compliance

The NRCB is responsible for ensuring that the facilities that it has approved are built and operated in accordance with those approvals. The Board is also required to respond to complaints regarding existing operations, and for ensuring that these facilities also meet the appropriate regulatory requirements. Key to this process will be field inspections and, where necessary, an effective compliance process.

In designing its inspection/compliance program, the NRCB has taken the view that the public interest is best served by first ensuring that facilities remain in compliance and that, where facilities are not in compliance, they are brought back into compliance as quickly and as efficiently as possible.

To achieve the first goal, the NRCB intends to develop and provide to producers copies of its inspection manuals, so that producers can clearly understand what inspectors will be looking for during their site visits. The NRCB inspectors will also be prepared to assist the producer in identifying areas of the operation that may be at risk of a future contravention and to suggest ways that this can be avoided.

To achieve the second goal, when a facility is found to not be in compliance, an enforcement action suitable to the issue will be taken. However, the NRCB intends to use an "enforcement ladder" concept in these actions, with responses elevated only in the light of ongoing non-compliance. Furthermore, the NRCB will make available to all producers its enforcement ladder so that there will be no misunderstanding of the Board's perspective on these issues.

For all non-compliance, the Inspectors will provide the producer, in writing, with specific directions as to:

- what remedial action is required to address the issue;
- when the remedial action must be complied with; and
- the consequences of failing to meet the first two requirements.

Experience has shown that the absence of any one of these key elements leads to an inefficient and ineffective compliance process.

If the facility is brought back into compliance within the prescribed time, then no enforcement action will normally occur. It is only if the facility remains in non-compliance that the already prescribed enforcement action will be taken, and the consequences of continued non-compliance will be moved up the enforcement ladder.

The Board also recognizes that consistency in enforcement practices will be a key element in ensuring that the public interest is protected. To ensure that this occurs, the NRCB will constantly review actions taken to ensure that there is consistency, and will put in place an appeals process for producers if they believe a proposed action is unfair or unwarranted for the circumstances.