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## **Annotations of NRCB Review Decisions Under the *Agricultural Operations Practices Act***

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**Matter Commented On:** Decisions of the Natural Resources Conservation Board under the *Agricultural Operation Practices Act*, [RSA 2000, c. A-7](#)

This post is a heads-up about my recently updated [annotations](#) of Natural Resources Conservation Board (NRCB) “review” decisions under the *Agricultural Operation Practices Act*, [RSA 2000, c. A-7](#) (*AOPA*).

Part II of *AOPA* gives the NRCB regulatory authority over Alberta-based “confined feeding operations” (CFOs), which are commonly known as intensive livestock operations. (Part I of the *AOPA* provides so-called “right-to-farm” protection for “agricultural operations” and a system for resolving nuisance claims by those operations’ neighbours. See e.g. Brenda Heelan Powell, [Agricultural Lands – Law and Policy in Alberta](#) (Environmental Law Centre, Nov 2019) at 76.) Before *AOPA* came into effect in 2002, municipalities were the primary regulators of CFOs through their issuance of development permits. This permitting function is linked to municipalities’ land use planning roles.

*AOPA* created a two-tier regulatory system for CFOs. The first tier consists of front line permitting and enforcement functions, carried out by NRCB “approval officers” and inspectors, respectively. The second tier consists of quasi-judicial “reviews”—conducted by panels of NRCB board members—of those front line permitting and enforcement decisions.

My annotations cover the 60 or so review decisions the NRCB has issued since roughly mid-2017. These annotations give the reader a sense of the number and complexity of issues the NRCB grapples with in implementing the *AOPA*, and of how the NRCB has tried to resolve them.

*AOPA* is remarkably complex for its relatively short length. This complexity stems in part from the act’s ambitious objective of promoting province-wide consistency in the regulation of CFOs while still honouring each municipality’s land use planning preferences.

*AOPA* aims to achieve this objective by shifting the CFO permitting function from Alberta municipalities to NRCB approval officers, while requiring those approval officers to deny a CFO permit application if it is “inconsisten[t] with” the local municipality’s “municipal development

plan [MDP] land use provisions” (*AOPA*, ss 20(1)(b)(a) & 22(1)(a)). MDP’s are high level “statutory plans” under the *Municipal Government Act*, [RSA 200, c. M-26](#).

Under *AOPA*, NRCB approval officers have no discretion to grant a CFO permit application if it is inconsistent with the local MDP. By contrast, *AOPA* section 25(4)(d) states that when reviewing an approval officer’s permit decision, NRCB board members must “have regard to,” but are “not bound by” an MDP.

This legislative compromise of provincial and municipal powers has raised a number of fundamental questions, including these:

- The MDP consistency requirement applies specifically to MDP “land use provisions” rather than to MDPs as a whole. How are MDP “land use provisions” different from other MDP provisions? Since MDPs are land use plans, aren’t all MDP provisions “land use provisions,” by definition?
- Under sections 20(1.1) and 22(2.1) of *AOPA*, the MDP consistency requirement is inapplicable to MDP provisions “respecting tests or conditions related to the construction of or the site for” a CFO or manure storage facility. Do “conditions related to” a CFO site include setbacks or exclusion zones and other typical land use planning-type restrictions? How does a CFO “site” differ from a simple land location for land use planning purposes? Does this exemption mean that the Legislature considers MDP provisions respecting “tests or conditions” to be “land use provisions”? (If not, then isn’t the exemption for “tests or conditions” redundant?)
- To what extent should the NRCB consider CFO-related provisions in a municipality’s land use bylaw, or in other statutory or non-statutory land use plans adopted under the MGA, besides those in the MDP? Should these non-MDP provisions have the same force as MDP land use planning provisions?
- Should the NRCB uphold a municipality’s MDP that effectively bans all CFOs, or CFOs with certain livestock types or sizes, within its boundaries? What about an MDP that has a CFO setback or exclusion zone that refers to, but increases, a setback requirement in *AOPA*?
- What criteria can or should the NRCB’s board members consider in deciding whether to honour an MDP’s land use provisions?

*AOPA* not only attempts a complex balance of “vertical,” provincial/municipal powers, the act also becomes part of a complex and ambiguous legislative balance of “horizontal” powers, between the NRCB and other provincial agencies.

Many provisions in *AOPA* and its accompanying regulations are narrowly focused on protecting groundwater and surface waters from leakage and runoff of manure contaminants from CFO facilities. The NRCB’s implementation of these provisions overlaps somewhat with Alberta

Environment’s environmental protection mandates under the *Environmental Protection and Enhancement Act*, [RSA 2000, c. E-12](#) (*EPEA*) and the *Water Act*, [RSA 2000, c. W-3](#). However, at least the NRCB’s scope of authority in implementing these specific provisions is relatively clear.

But other sections of the *AOPA* require approval officers to consider broad categories of effects when permitting large CFOs — namely, CFOs’ “effects” on “natural resources administered by ministries” (at s 20(1)(b)(vi)) and CFOs’ “effects on the environment, the economy and the community and the appropriate use of land” (at s 20(1)(b)(ix)). These broadly worded permitting factors implicitly encompass subjects addressed by other agencies. For example, “effects on the environment” implicitly includes risks to ground water supplies. Yet, the *Water Act* gives Alberta Environment direct responsibility for protecting those resources. Similarly, “effects on the community” implicitly includes nuisance or potentially unhealthy odours. (In addition, regulations under the Act use odour-related variables in a prescribed formula for approval officers to calculate required setbacks for CFOs from nearby residences. See *Standards and Administration Regulation*, [Alta Reg 267/2001](#) at s 3(2), and Schedule 1 at ss 1(g), (h) & 2-4.) Yet, *EPEA* (at s 116) gives Alberta Environment specific authority to issue environmental protection orders to persons responsible for “substances” or “things” causing “offensive odour[s]”.

This authority does not apply to “agricultural operations” that are being conducted according to “generally accepted practices” (*EPEA* at s 116(2)). This exemption clearly refers to agricultural operations under Part I of *AOPA*. However, the exemption’s application to CFOs permitted under Part II of *AOPA* is hardly certain.

The legislative overlaps between *AOPA* and other regulatory statutes, including *EPEA* and the *Water Act*, raise challenging questions about where the NRCB’s authority starts and ends, and how the NRCB should manage regulatory overlaps with other provincial regulators.

Besides raising these inter-agency jurisdictional issues, *AOPA* raises many of the same complex issues that arise from all or most environmental regulatory statutes. These issues include:

- Whether and how to quantify risks and decide what risk levels are acceptable.
- Whether and how to address cumulative effects.
- How to balance commercial interests with those of adjacent landowners.
- How to determine which citizens and other parties might be sufficiently affected by a proposed CFO to have standing to participate in the CFO’s permitting.
- Whether and how to grandfather older (pre-*AOPA*) operations—that is, to exempt them from regulatory standards for new operations.
- Whether and to what extent an administrative quasi-judicial tribunal should defer to the technical and policy judgements of front-line regulatory decision-makers.

In short, one can learn much about the classic challenges of environmental regulatory regimes just by studying *AOPA*’s approach to regulating the intensive livestock sector. Of course, learning

about *AOPA* is a practical necessity for lawyers with *AOPA* files, and citizens and CFO owners involved in *AOPA* regulatory proceedings. My annotations aim to facilitate all of these research efforts.

The annotations cover the roughly 60 decisions issued by the NRCB's board members in the last five years. Because *AOPA* came into effect in 2002, my annotations do not cover the first 15 years or so of the NRCB's regulatory program under the act. However, the last five years of NRCB decisions address many, or most, of the predominant *AOPA*-related issues the NRCB has faced since the act came into effect. Thus, my annotations of those decisions should help readers in understanding how the NRCB has grappled with many of those *AOPA* issues. (As the introduction to annotations states, the annotations are intended to provide general information and are not meant as legal advice.)

Readers can download the annotations [here](#).

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